Supreme Court, U.S.
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No. 85-2156

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

SHAARE TEFILA CONGREGATION, *et al.*,
Petitioners,

vs.

JOHN WILLIAM COBB, *et al.*,
Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED JULY 3, 1986
CERTIORARI GRANTED OCTOBER 6, 1986

90 1P

JOINT APPENDIX*

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

NO. R-84-880

SHAARE TEFILA CONGREGATION, *et al.*,
Plaintiffs,

v.

JOHN WILLIAM COBB, *et al.*,
Defendants.

RELEVANT DOCKET ENTRIES

DATE	NR.	PROCEEDINGS
1984		
Mar 6	1	Complaint.
Mar 6	2	Summons Issued. (ccs. & Mag. Notice signed for by Counsel for Plaintiffs for Service). (Thomas Joseph Hunt, Jr. -- see pleading #3; Queen served 3/8/84; Remer (?) served 3/15/84; William Randall Harris served 3/7/84 -- see pleading #3) (Cobb served 7/11/84 -- see pleading #13) (William Hess served 8/16/84 -- see #15) (Raymond Jordan served 9/10/84 -- see #19)
Mar 26	3	Affidavits of service and attachments.
Mar 28	4	ANSWER of Defendant, Dominic Queen.

Apr 11	5	ANSWER of Defendant, William Randall Harris and CROSSCLAIM against all co-defendants.
Apr 16	6	Appearance of Joseph M. Niland, Esq., as attorney for Defendant, Dominic Queen. (c/s)
Apr 30	7	Motion of Aetna Casualty & Surety Company to Intervene; Points and Authorities; proposed Order and proposed Complaint. (c/s)
May 11	8	Response of Plaintiff to Motion of Aetna Casualty to Intervene. (c/s)
May 14	9	ORDER (Ramsey, J) "GRANTING" Aetna Casualty and Surety Company Leave to Intervene as Plaintiff. (c/m 5/14/84 jf) (see pleading #7)
Jun 1	10	Petition for appointment of counsel. (c/s)
Jun 4	11	ANSWER of Defendant, William Randall Harris, to Intervening Complaint; and CROSSCLAIM, against John William Cobb, Thomas Lloyd Heine, Lee Jordan, Domenic [*sic*] Queen, and Michael David Remer.
Jul 18	13	Affidavit of Service.
Aug 21	15	Affidavit of Service of William Hess.
Aug 22	17	Motion of Plaintiffs for Relief under Fed. R. Civ. P. 37(d); Memorandum; Affidavit, Attachment A through C, and proposed Order. (c/s)
Sep 7	18	Order (Ramsey, J.) "APPOINTING" Robert B. Barnhouse, Esquire as counsel for Defendant, Michael David Remer. (c/m 9/7/84 ph)

Sep 13	19	Affidavit of Service.
Oct 15	22	Memorandum and ORDER (Ramsey, J) that Defendant, Thomas J. Hunt, Jr., shall attend his deposition at a time, date, and place mutually agreed upon by the parties within 20 days after the date of this Order. (c/m 10/15/84 jf)
Oct 24	23	Motion of Plaintiff for Class Certification; Memorandum; Affidavit. (c/s)
Nov 28	26	Motion and Order (Ramsey, J.) extending the time within which Defendant, Michael Remer, shall respond to motion of Plaintiff for certification of Class to and including 20 days after decision made on the motion to dismiss. (c/m 11/28/84 ph)
Nov 28	27	Motion of Defendant, Michael David Remer, to Dismiss, and Memorandum. (c/s)
Dec 21	29	Opposition of Plaintiff to motion to dismiss, and attachments A thru H. (c/s)
1985		
Jan 29	31	Reply of Defendant, Remer, to Opposition by Plaintiff to Motion to Dismiss; Exhibit A and Request for Hearing. (c/s)
Mar 12	32	Motion of Plaintiff for leave to depose defendant, Michael David Remer, in prison, memorandum and proposed order. (c/s)
Mar 18	33	Supplemental Memorandum of Plaintiffs in support of Motion for Leave to depose Michael David Remer in prison. (c/s)
Mar 26	35	Opposition of Defendant, Michael David Remer, to Motion of Plaintiffs for leave to Depose Remer in Prison; proposed order. (c/s)

Apr 22	36	MEMORANDUM (Ramsey, J). (c/m 4/22/85) (E.O.D. 4/22/85 jf)
Apr 22	37	JUDGMENT (Ramsey, J) entered in favor of Defendants against Plaintiffs. (c/m 4/22/85) (E.O.D. 4/22/85 jf)
May 8	38	Notice of Appeal of Shaare Tefila Congregation, Rabbi Martin L. Halpern, Shirley Altman, William Harkaway, Marshall S. Levin, Maurice Potosky and Dr. Jacob Teller. (filing fee paid) (c/m 5/28/85 cmk)

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 85-1544

SHAARE TEFILA CONGREGATION, *et al.*,
Appellants,

v.

JOHN WILLIAM COBB, *et al.*,
Appellees.

RELEVANT DOCKET ENTRIES

DATE	FILINGS -- PROCEEDINGS
5/8/85	Notice of Appeal filed.
5/30/85	Case docketed. R[ecord] O[n] A[ppeal] filed. saw
8/1/85	Brief for Appellants and Appendix filed.
9/11/85	Brief for Appellees filed.
10/2/85	Reply Brief for Appellants filed.
11/5/85	Oral argument.
3/7/86	Opinions and Judgment entered.

3/28/86	Mandate issued.
7/3/86	Petition for Writ of Certiorari filed.
10/6/86	Supreme Court of the United States order granting certiorari on 10/6/86 filed. Case scheduled to be orally argued in tandem with Saint Francis College, et al. v. Majid Ghaican Al-Khazrahji [*sic*], etc. (Supreme Court No. 85-2169). mb (copy to panel).

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

CIVIL ACTION NO. R-84-880

SHAARE TEFILA CONGREGATION, *et al.*
Plaintiffs,

v.

JOHN COBB, *et al.*,
Defendants

[Filed Sept. 7, 1984]

ORDER

IT IS HEREBY ORDERED, this 7th day of September, 1984, by the United States District Court for the District of Maryland, that Robert B. Barnhouse, Esquire, Piper & Marbury, 1100 Charles Center South, 36 S. Charles Street, Baltimore, MD 21201, be appointed to represent a defendant, Michael David Remer in the above-captioned case.

/s/ NORMAN P. RAMSEY
Norman P. Ramsey
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

CIVIL ACTION NO. R-84-880

SHAARE TEFILA CONGREGATION, *et al.*,
Plaintiffs,

v.

COBB, *et al.*,
Defendants.

[Filed Nov. 28, 1984]

MOTION TO DISMISS

Michael David Remer, a defendant, by his attorneys, Robert B. Barnhouse and Deborah T. Garren, hereby moves this Court, pursuant to Rule 12(b)(1) and (6) of the Federal Rules of Civil Procedure, to dismiss the plaintiffs' Complaint and, as grounds therefor, states:

1. The Complaint fails to state a claim upon which relief can be granted under the "full and equal benefits" clause of 42 U.S.C. § 1981, inasmuch as claims of religious discrimination are not judicially cognizable under that statute.

2. The Complaint fails to state a claim upon which relief can be granted under the "full and equal benefits" clause of 42 U.S.C. § 1981, inasmuch as it fails to allege state action.

3. The Complaint fails to state a claim upon which relief can be granted under 42 U.S.C. § 1982, inasmuch as claims of religious discrimination are not judicially cognizable under that statute.

4. This Court lacks jurisdiction over the subject matter of this action under 42 U.S.C. § 1985(3) because the Com-

plaint fails to allege a conspiracy for the purpose of depriving the plaintiffs of rights guaranteed by federal law or the U.S. Constitution. First, the Complaint fails to allege any facts which show a violation of the plaintiffs' federal constitutional right to interstate travel. Second, the Complaint fails to allege violations of 42 U.S.C. §§ 1981 and 1982 because those provisions do not address religious discrimination. Third, the Complaint fails to allege a violation of the plaintiffs' First Amendment right to assemble and worship because it does not allege state action.

5. This Court lacks subject matter jurisdiction over the pendent state claims of trespass, nuisance and intentional infliction of emotional distress.

WHEREFORE, defendant prays that his Motion to Dismiss be granted.

In support of his motion, defendant submits a memorandum.

Respectfully submitted,

/s/ ROBERT B. BARNHOUSE
ROBERT B. BARNHOUSE

/s/ DEBORAH T. GARREN
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[Certificate of Service Omitted
in Printing]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

CIVIL ACTION NO. R-84-880

SHAARE TEFILA CONGREGATION, *et al.*,
Plaintiffs,

v.

COBB, *et al.*,
Defendants.

[Filed Nov. 28, 1984]

MEMORANDUM IN SUPPORT OF MOTION TO DISMISS

Michael David Remer, a defendant, by his attorneys, Robert B. Barnhouse and Deborah T. Garren, submits the following Memorandum in support of his Motion to dismiss, previously filed herein.

INTRODUCTION

On March 6, 1984, the plaintiffs filed this civil action which asserted a variety of federal and state claims allegedly arising from the defendants' desecration of the synagogue of the Shaare Tefila Congregation. The plaintiffs based their claims on several federal civil rights statutes, 42 U.S.C. §§ 1981, 1982, and 1985(3), and on the Maryland common law of trespass, nuisance, and intentional infliction of emotional distress. They sought jurisdiction over their claims under 28 U.S.C. §§ 1331 and 1343(a)(1) and (4); 28 U.S.C. §§ 2201 and 2202; and the principles of pendent jurisdiction.

ARGUMENT

I.

The Complaint fails to state a claim upon which relief can be granted under 42 U.S.C. § 1981 because that statute is inapplicable to discrimination on the basis of religion.

Count I of the plaintiffs' Complaint attempts to allege a cause of action under 42 U.S.C. § 1981, which provides, in pertinent part:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property *as is enjoyed by white citizens* . . .

(Emphasis added.) Specifically, the plaintiffs allege that the desecration of their synagogue deprived them of "the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens."

Section 1981 had its origin in the first section of the Civil Rights Act of 1866. *Tillman v. Wheaton-Haven Recreation Association,* 410 U.S. 431, 439 (1973). At the time of that statute's enactment, the Thirteenth Amendment to the U.S. Constitution had been ratified, but the Fourteenth Amendment had not. Accordingly, the constitutional basis for § 1981, as originally enacted, was the Thirteenth Amendment, which provides:

> Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

> Congress shall have power to enforce this article by appropriate legislation.

On several occasions, the Supreme Court has held that § 1981's prohibition against private acts of race discrimination is within Congress' power under § 2 of the Thirteenth Amendment. *Runyon v. McCrary,* 427 U.S. 160, 170, 179 (1976); *McDonald v. Santa Fe Trail Transportation Co.,* 427 U.S. 273, 287-96 (1976).

Given its constitutional derivation in the Thirteenth Amendment's prohibition of slavery, it is not surprising that the courts uniformly have held that § 1981 is addressed solely to race discrimination. *Georgia v. Rachel,* 384 U.S. 780, 791 (1966); *Occhino v. Northwestern Bell Telephone Co.,* 675 F.2d 220 (8th Cir. 1982), *cert. denied,* 457 U.S. 1139 (1982); *Olivares v. Martin,* 555 F.2d 1192 (5th Cir. 1977); *Patterson v. American Tobacco Co.,* 535 F.2d 257 (4th Cir. 1976), *cert. denied,* 429 U.S. 920 (1976); *Waller v. Butkovich,* 584 F. Supp. 909 (M.D. N.C. 1984); *Saad v. Burns International Security Services, Inc.,* 456 F. Supp. 33 (D.D.C. 1978); *Baca v. Butz,* 394 F. Supp. 888 (D.N.M. 1975); *Easley v. Blossom,* 394 F. Supp. 343 (S.D. Fla. 1975); *Gradillas v. Hughes Aircraft Co.,* 407 F. Supp. 865 (D. Ariz. 1975); *Thomas v. Firestone Tire & Rubber Co.,* 392 F. Supp. 373 (N.D. Tex. 1975); *Marshall v. Plumbers & Steamfitters, Local 60,* 343 F. Supp. 70 (E.D. La. 1972); *Williams v. San Francisco Unified School District,* 340 F. Supp. 438 (N.D. Cal. 1972); *Ambrek v. Clark,* 287 F. Supp. 208 (E.D. Pa. 1968); *Swift v. Fourth National Bank of Columbus,* 205 F. Supp. 563 (M.D. Ga. 1962).

The Supreme Court has noted that § 1981 does not address religious discrimination. *Runyon v. McCrary, supra* at 167. The lower courts have agreed that claims of discrimination based on religion simply are not cognizable under § 1981. *Manzanares v. Safeway Stores, Inc.,* 593 F.2d 968 (10th Cir. 1979); *Khawaja v. Wyatt,* 494 F. Supp.

302 (W.D. N.Y. 1980); *Saad v. Burns International Security Services, Inc., supra; Turner v. Unification Church,* 473 F. Supp. 367 (D.R.I. 1978), *aff'd,* 602 F.2d 458 (1st Cir. 1979); *Reese v. Abbott Laboratories,* 493 F. Supp. 185 (N.D. Ill. 1978); *Mouriz v. Avondale Shipyards, Inc.,* 428 F. Supp. 1025 (E.D. La. 1977); *Balmes v. Board of Education of Cleveland City School District,* 436 F. Supp. 129 (N.D. Ohio 1977); *Schetter v. Heim,* 300 F. Supp. 1070 (E.D. Wis. 1969).

The Complaint in this case alleges essentially that plaintiffs were deprived of the full and equal benefit of the laws because of their Jewish faith. There is no allegation of racial discrimination, the only wrong which § 1981 was intended to address.

The plaintiffs have attempted to avoid § 1981's limited application to race discrimination by stating that "defendants perceive plaintiffs as racially distinct because they are Jews." Paragraph 19 of the Complaint. However, such a pleading artifice cannot bring their claim within a statute which clearly was not intended to address it. Section 1981 secures to all persons the same rights as are "enjoyed by white citizens." Both white and nonwhite citizens can be and are members of the Jewish religion. Jews simply are not members of a distinct race which the Thirteenth Amendment and § 1981 were designed to protect. Accordingly, Count I of the plaintiffs' Complaint, which alleges a cause of action under § 1981, must be dismissed.

II.

The Complaint fails to state a claim upon which relief can be granted under the "full and equal benefits" clause of 42 U.S.C. § 1981 because it fails to allege state action.

As noted above, Count I of the plaintiffs' Complaint attempts to allege a cause of action under the "full and equal benefits" clause of 42 U.S.C. § 1981. Specifically,

plaintiffs allege that the desecration of their synagogue deprived them of "the full and equal benefit of laws for the security of persons and property." Paragraph 19 of the Complaint. However, plaintiffs fail to claim any state involvement in the alleged deprivation. Since such state action is necessary to state a claim under the "full and equal benefits" clause of § 1981, Count I of the Complaint must be dismissed.

Among other things, § 1981 provides to all persons the same right "to make and enforce contracts" and "to the full and equal benefit of all laws . . . as is enjoyed by white citizens." Cases arising under § 1981 almost always address the "contracts" clause. For example, a plaintiff states a claim under the "contracts" clause of § 1981 when he alleges that defendants—whether public or private—have discharged him from employment or denied him admission to a school because of his race. *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454 (1975); *Runyon v. McCrary*, 427 U.S. 160 (1976).

On the other hand, cases arising under § 1981 rarely invoke the "full and equal benefits" clause. When plaintiffs do rely on that clause, they typically are challenging some sort of governmental action. *See, e.g., Graham v. Richardson*, 403 U.S. 365 (1971) (discrimination in government benefit programs); *Hall v. Pennsylvania State Police*, 570 F.2d 86 (3rd Cir. 1978) (racial discrimination in law enforcement); *Raffety v. Prince George's County*, 423 F. Supp. 1045 (D. Md. 1976) (racial harassment by police and fire department investigators); *Resident Advisory Board v. Rizzo*, 425 F. Supp. 987 (E.D. Pa. 1976), *modified*, 564 F.2d 126 (3rd Cir. 1977), *cert. denied*, 435 U.S. 908 (1978) (discrimination in public housing); *Lopez v. White Plains Housing Authority*, 355 F. Supp. 1016 (S.D. N.Y. 1972) (discriminatory housing regulations).

In recognition of the governmental emphasis of the "full and equal benefits" clause, several courts have stated that,

unlike the "contracts" clause, it does not reach private acts of discrimination. In *Mahone v. Waddle,* 564 F.2d 1018 (3rd Cir. 1977), *cert. denied,* 438 U.S. 904 (1978), the court distinguished the "full and equal benefits" clause from the "contracts" clause in one important respect. It noted that the right "to make and enforce contracts" was by nature concerned with relationships between private parties, and a prohibition against race discrimination in the private sector was readily implied. On the other hand, the Court stated:

> The words "full and equal benefit of all *laws and proceedings* for the security of persons and property" (emphasis supplied) . . . suggest a concern with relations between the individual and the state, not between two individuals. The state, not the individual, is the sole source of law, and it is only the state acting through its agents, not the private individual, which is capable of denying to blacks the full and equal benefit of the law. Thus, while private discrimination may be implicated by the contract clause of section 1981, the concept of state action is implicit in the equal benefit clause.

Id. at 1029.

The U.S. District Court for the Eastern District of Virginia recently adopted the *Mahone* court's interpretation of the "full and equal benefits" clause. In *Eggleston v. Prince Edward Volunteer Rescue Squad, Inc.,* 569 F. Supp. 1344 (E.D. Va. 1983), *aff'd,* 742 F.2d 1448 (4th Cir. 1984), the court dismissed the plaintiff's action, which challenged his expulsion from a private rescue squad under the "full and equal benefits" clause. It stated:

> In the instant case, . . . there is no State action in defendants' conduct in dismissing plaintiff from membership in the Rescue Squad. Thus no amount of expansive reading can generate a §

> 1981 claim relating to the "full benefit" . . . language.

Id. at 1353.

The Complaint in this case alleges that defendants' desecration of the synagogue "deprived plaintiffs of the full and equal benefit of laws." However, there is no state action involved in defendants' alleged conduct in desecrating the synagogue. Because no state action exists to support a claim under § 1981's "full and equal benefits" clause, Count I of the Complaint must be dismissed.

III.

The Complaint fails to state a claim upon which relief can be granted under 42 U.S.C. § 1982 because that statute is inapplicable to discrimination on the basis of religion.

Count II of the plaintiffs' Complaint attempts to allege a cause of action under 42 U.S.C. § 1982, which provides:

> All citizens of the United States shall have the same right, in every State and Territory, *as is enjoyed by white citizens* thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.

(Emphasis added.) Specifically, the plaintiffs allege that the desecration of their synagogue deprived them of "the same right . . . as is enjoyed by white citizens . . . to . . . hold . . . real and personal property."

Section 1982, like 42 U.S.C. § 1981, had its origin in the first section of the Civil Rights Act of 1866. *Tillman v. Wheaton-Haven Recreation Association*, 410 U.S. 431, 439 (1973). At the time of that statute's enactment, the Thirteenth Amendment to the U.S. Constitution had been ratified, but the Fourteenth Amendment had not. Accordingly, the constitutional basis for § 1982, as originally en-

acted, was the Thirteenth Amendment, which abolished slavery. The Supreme Court has firmly established that § 1982's prohibition against private acts of race discrimination is within Congress' power under § 2 of the Thirteenth Amendment. *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968).

Given its constitutional derivation in the Thirteenth Amendment's prohibition of slavery, it is not surprising that the courts uniformly have held that § 1982 is addressed solely to race discrimination. *Glover v. Tower*, 700 F.2d 556 (9th Cir. 1983); *Occhino v. Northwestern Bell Telephone Co.*, 675 F.2d 220 (8th Cir. 1982), *cert. denied*, 457 U.S. 1139 (1982); *Petrone v. City of Reading*, 541 F. Supp. 735 (E.D. Pa. 1982); *Fantroy v. Greater St. Louis Labor Council*, 478 F. Supp. 355 (E.D. Mo. 1979); *Patel v. Holley House Motels*, 483 F. Supp. 374 (S.D. Ala. 1979); *Smith v. Woodhollow Apartments*, 463 F. Supp. 16 (W.D. Okla. 1978); *Lee v. Minnock*, 417 F. Supp. 436 (W.D. Pa. 1976), *aff'd*, 556 F.2d 567 (3rd Cir. 1977); *Arnold v. Tiffany*, 359 F. Supp. 1034 (C.D. Cal. 1973), *aff'd*, 487 F. 2d 216 (9th Cir. 1973), cert. denied, 415 U.S. 984 (1974); *Cahill v. Cedar County*, 367 F. Supp. 39 (N.D. Iowa 1973), *aff'd*, 419 U.S. 806 (1974).

The Supreme Court has noted that § 1982 does not address religious discrimination. *Jones v. Alfred H. Mayer Co., supra* 413. Accordingly, no federal court has extended that statute to encompass claims of discrimination on grounds of religion. In *Weiss v. Willow Tree Civic Association*, 467 F. Supp. 803 (S.D. N.Y. 1979), the district court rejected the § 1982 claim of a group of Hasidic Jews who, like the plaintiffs in this case, sought to characterize their religious claim as a race claim. The Jewish plaintiffs in *Weiss* sued a civic association and its members for harassing them and delaying their establishment of a housing development. The court dismissed their § 1982 claim for failure to allege a racial animus, stating:

> While it is true that plaintiffs charge that defendants' conduct was directed against them because of "race and religion," the complaint makes it clear that the hard core of their charge is anchored to their religion, manner of dress and life style. Plaintiffs' gratuitous inclusion of the word "race" in an apparent effort to come within the *Mayer* ruling cannot down the true nature and essence of their complaint.

Id. at 816. *See also Schetter v. Heim,* 300 F. Supp. 1070 (E.D. Wis. 1969).

The Complaint in this case alleges essentially that plaintiffs were deprived of the right to hold real and personal property because of their Jewish faith. There is no allegation of racial discrimination, the only wrong which § 1982 was intended to address.

The plaintiffs have attempted to avoid § 1982's limited application to race discrimination by stating that "defendants perceive plaintiffs as racially distinct because they are Jews." Paragraph 21 of the Complaint. However, such a pleading artifice cannot bring their claim within a statute which clearly was not intended to address it. Section 1982 secures to all citizens the same right "as is enjoyed by white citizens" to hold real and personal property. Both white and nonwhite citizens can be and are members of the Jewish religion. Jews simply are not members of a distinct race which the Thirteenth Amendment and § 1982 were designed to protect. Accordingly, Count II of the plaintiffs' Complaint, which alleges a cause of action under § 1982, must be dismissed.

IV.

This Court lacks jurisdiction over the subject matter of this action under 42 U.S.C. § 1985(3) because the Complaint fails to allege a deprivation of rights guaranteed by federal law or the U.S. Constitution.

Count III of the plaintiffs' Complaint attempts to allege a cause of action under 42 U.S.C. § 1985(3), which provides, in pertinent part:

> If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons *of the equal protection of the laws, or of equal privileges and immunities under the laws;* . . . in any case of conspiracy set forth in the section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.

(Emphasis added.) The plaintiffs allege that, by conspiring to desecrate the Shaare Tefila synagogue, the defendants conspired for the purpose of depriving them of "the equal protection of the laws, or of equal privileges and immunities under the laws." They base the alleged deprivation of their rights under § 1985(3) on "plaintiffs' federal constitutional right to travel, 42 U.S.C. §§ 1981 and 1982, plaintiffs' right to assemble and worship, Maryland criminal laws . . . and Maryland common law . . . ." Paragraph 23 of the Complaint. For the reasons discussed below,

plaintiffs have not stated a claim under § 1985(3) based on any of the above enumerated rights.

Section 1985(3) provides no substantive rights itself. It merely provides a remedy for certain preexisting federal rights — the rights to equal protection of the laws and equal privileges and immunities under the laws. *Great American Federal Savings & Loan Association v. Novotny*, 442 U.S. 366, 372 (1979).

The rights protected by § 1985(3) are limited to federal statutory and constitutional rights. Consequently, in order to state a claim under that section, plaintiffs must allege that the conspiracy was intended to deprive them of a right protected by federal law. *McNutt v. Duke Precision Dental & Orthodontic Laboratories, Inc.*, 698 F.2d 676 (4th Cir. 1983); *Holmes v. Finney*, 631 F.2d 150 (10th Cir. 1980); *Doski v. M Goldeseker Co.*, 539 F.2d 1326 (4th Cir. 1976); *Cohen v. Illinois Institute of Technology*, 524 F.2d 818 (7th Cir. 1975), *cert. denied*, 425 U.S. 943 (1976); *Wright v. Methodist Youth Services, Inc.*, 511 F. Supp. 307 (N.D. Ill. 1981); *Johnston v. NBC, Inc.*, 356 F. Supp. 904 (E.D. N.Y. 1973); *Bellamy v. Mason's Stores, Inc.*, 368 F. Supp. 1025 (E.D. Va. 1973), *aff'd*, 508 F.2d 504 (4th Cir. 1974); *Grisom v. Logan*, 334 F. Supp. 273 (C.D. Cal. 1971); Rights owing their existence to state law simply are not protected under § 1985(3). *Miles v. Armstrong*, 207 F.2d 284 (7th Cir. 1953) (complaint which averred only state law violations did not state federal cause of action under § 1985(3)); *Hodge v. Stout*, 377 F. Supp. 131 (E.D. Tenn. 1974) (trespass does not rise to the level of a constitutional violation); *Ruark v. Schooley*, 211 F. Supp. 921 (D. Colo. 1962) (§ 1985(3) does not address violations of state law and the state constitution).

Since § 1985(3) protects only federal rights, the plaintiffs in this case cannot assert a § 1985(3) claim based on Maryland criminal and common law. The remainder of this ar-

gument discusses the viability of plaintiffs' § 1985(3) claims based on federal statutory and constitutional rights.

The Supreme Court has explicitly defined the scope of the federal cause of action made available by § 1985(3). Thus, in *Griffin v. Breckenridge,* 403 U.S. 88 (1971), it held that § 1985(3) reaches purely private conspiracies whenever they are aimed at depriving plaintiffs of rights protected by the Thirteenth Amendment or of the constitutional right to interstate travel. In *United Brotherhood of Carpenters and Joiners, Local 610 v. Scott,* ___ U.S.__ , 77 L.Ed.2d 1049 (1983), the Court indicated that its holding in *Griffin* does not extend beyond Thirteenth Amendment rights and the federal right to interstate travel. It held:

> . . . an alleged conspiracy to infringe First Amendment rights is not a violation of § 1985(3) unless it is proved that the state is involved in the conspiracy or that the aim of the conspiracy is to influence the activity of the state.

Id. at 1055. Under *United Brotherhood,* in order to state a § 1985(3) claim for deprivation of rights derived from the Fourteenth Amendment, plaintiffs must allege state action. *See also Cohen v. Illinois Institute of Technology, supra; Bellamy v. Mason's Stores, Inc.,* 508 F.2d 504, 506 (4th Cir. 1974).

The plaintiffs in this case have attempted to allege a cause of action under § 1985(3) based on three distinct federal rights: (1) the federal constitutional right to interstate travel, (2) 42 U.S.C. §§ 1981 and 1982, and (3) the First Amendment right to assemble and worship. When evaluated in light of the above case discussion, their § 1985(3) claims based on those rights must fail.

A. The Complaint fails to allege any facts which show a violation of the plaintiffs' federal constitutional right to interstate travel.

Count III of the Complaint contains nothing more than a conclusory allegation that the defendants' desecration of the synagogue interfered with plaintiffs' federal constitutional right to interstate travel. The plaintiffs have made no effort whatsoever to explain the facts which allegedly support a violation of that right. Such a conclusory allegation of a constitutional violation is not sufficient to state a § 1985(3) claim. *See Blackburn v. Fisk University,* 443 F.2d 121 (6th Cir. 1971); *Kadlec v. Illinois Bell Telephone Co.,* 407 F.2d 624 (7th Cir. 1969); *Kamsler v. Zaslawsky,* 355 F.2d 526 (7th Cir. 1966); *Dunn v. Gazzola,* 216 F.2d 709 (1st Cir. 1954); *Greene v. Johns Hopkins University,* 469 F. Supp. 187 (D. Md. 1979); *Everett v. City of Chester,* 391 F. Supp. 26 (E.D. Pa. 1975); *Wetherington v. Phillips,* 380 F. Supp. 426 (E.D. N.C. 1974), *aff'd,* 526 F.2d 591 (4th Cir. 1975).

In those cases which have permitted a § 1985(3) claim for deprivation of the right to travel interstate, the complaint alleges specific facts which show an interference with that right. For example, in *Griffin v. Breckenridge, supra* at 105-06, the Supreme Court noted that the plaintiffs could show a violation of the right to interstate travel by proving that the defendants' conspiracy impaired their right to travel the public highways in and about Kemper County, Mississippi, and drove out-of-state civil rights workers from the state. *See also Ward v. Connor,* 657 F.2d 45 (4th Cir. 1981) (conspiracy to deprive plaintiff of his civil rights by kidnapping him, holding him captive, and subjecting him to physical and psychological abuse clearly prevented plaintiff from traveling from state to state); *Cooper v. Molko,* 512 F. Supp. 563 (N.D. Cal. 1981) (plaintiff in deprogramming case, who alleged that he was coerced into leaving the state with his parents and prevented from returning to his co-religionists in California,

has alleged interference with the right to travel interstate); *Annot.*, 27 L.Ed.2d 862, § 9 (1971).

When plaintiffs fail to allege specific facts which support an interference with the right to interstate travel, their § 1985(3) claims are denied. For example, in *Hughes v. Ranger Fuel Corp.*, 467 F.2d 6, 10 (4th Cir. 1972), the court held that the plaintiffs' claim of interference with the constitutional right to travel was "manifestly spurious" because they did not allege any impediment to their right to travel over the public roads.

Like the *Hughes* plaintiffs, the plaintiffs in this case have failed to allege any facts which show that defendants impeded their right to travel over the public roads. Consequently, their § 1985(3) claim cannot be based on an interference with the constitutional right to travel interstate.

B. The Complaint fails to allege violations of 42 U.S.C. §§ 1981 and 1982 because those provisions do not address religious discrimination.

Count III of the Complaint alleges that defendants conspired to deprive plaintiffs of their rights under 42 U.S.C. §§ 1981 and 1982. However, plaintiffs have failed to state claims under those sections for the reasons discussed in Arguments I through III above. To reiterate, plaintiffs have failed to state a claim under 42 U.S.C. § 1981 because that statute does not address religious discrimination and because the Complaint fails to allege state action. Plaintiffs have failed to state a claim under 42 U.S.C. § 1982 because that statute does not address religious discrimination. Under the circumstances, plaintiffs' § 1985(3) claim cannot be based on §§ 1981 and 1982.

C. The Complaint fails to allege a violation of plaintiffs' First Amendment right to assemble and worship because it does not allege state action.

Finally, Count III of the Complaint alleges that defendants conspired to deprive plaintiffs of their First

Amendment right to assemble and worship. However, as noted above, the Supreme Court has held that a conspiracy to infringe First Amendment rights does not violate § 1985(3) in the absence of state action. Plaintiffs' complaint contains no allegation that the state was involved in the alleged conspiracy or that the alleged conspiracy was aimed at influencing the activity of the state. Since plaintiffs do not allege state action in connection with the conspiracy, their § 1985(3) claim cannot be based on the First Amendment right to assemble and worship.

To summarize Argument IV, in order to state a claim under § 1985(3), the plaintiffs must allege a violation of federal statutory or constitutional rights. Plaintiffs have failed to make such an allegation. They have alleged no facts which would support a violation of the constitutional right to interstate travel; they have failed to state a claim under 42 U.S.C. §§ 1981 and 1982; and they have failed to allege any state involvement in an infringement of the plaintiffs' First Amendment right to assemble and worship. Accordingly, Count III of the Complaint, which alleges a cause of action under § 1985(3), must be dismissed.

V.

This Court lacks subject matter jurisdiction over the plaintiffs' pendent state law claims of trespass, nuisance, and intentional infliction of emotional distress.

Counts IV, V, and VI of the plaintiffs' Complaint attempt to allege claims under Maryland state law for trespass, nuisance, and intentional infliction of emotional distress. If this Court grants the defendant's motion to dismiss the federal counts, it has no pendent jurisdiction to entertain the state claims. Absent an independent federal basis for the Court's exercise of subject matter jurisdiction, it cannot assert jurisdiction over pendent state claims.

In *United Mine Workers of America v. Gibbs,* 383 U.S. 715 (1966), the leading Supreme Court case on pendent jurisdiction, the Court stated:

> Needless decisions of state law should be avoided both as a matter of comity and to promote justice between the parties, by procuring for them a surer-footed reading of applicable law. *Certainly, if the federal claims are dismissed before trial, even though not insubstantial in a jurisdictional sense, the state claims should be dismissed as well.*

(Emphasis added.) *Id.* at 726. Consistent with the above-quoted language, the Fourth Circuit and this Court both have declined to exercise pendent jurisdiction over state claims when all federal claims have been disposed of prior to a full trial on the merits. *Ancarrow v. City of Richmond,* 600 F.2d 443, 448 n. 5 (4th cir. 1979), *cert. denied,* 444 U.S. 992 (1979); *Sigmon v. Poe,* 564 F.2d 1093, 1096 (4th Cir. 1977); *O'Hara v. Kovens,* 473 F. Supp. 1161, 1167 (D. Md. 1979), *aff'd,* 625 F.2d 15 (4th Cir. 1980), *cert. denied,* 449 U.S. 1124 (1981). *See also* 13 C. Wright, A. Miller & E. Cooper, *Federal Practice & Procedure* § 3567.1, at 133 n. 18-19 (1984).

In this case, the defendant has moved to dismiss all of the plaintiffs' federal claims contained in Counts I through III of the Complaint. In light of the principles of pendent jurisdiction discussed above, if the Court dismisses the first three counts of the Complaint, it must also dismiss the plaintiffs' pendent state claims.

CONCLUSION

For the reasons set forth above, the defendant's Motion to Dismiss the plaintiffs' Complaint should be granted.

Respectfully submitted,

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IN THE
UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF MARYLAND

Civil Action No. R84-880

SHAARE TEFILA CONGREGATION, *et al.*,
Plaintiffs,

v.

JOHN WILLIAM COBB, *et al.*,
Defendants.

[Filed Dec. 21, 1984]

PLAINTIFFS' OPPOSITION TO MOTION TO DISMISS

On November 1, 1982, the synagogue of plaintiff Shaare Tefila Congregation was desecrated with spray-painted anti-Semitic slogans and symbols, including swastikas, a burning cross, the words "DEAD JEW," "DEATH TO THE JUDE," and "IN, TAKE A SHOWER JEW." Tab A and Attachments 1-6. Defendant Remer seeks dismissal of the Complaint in this action, brought by the victims of the desecration, on grounds that the federal civil rights acts do not reach his conduct. Because the Complaint states a claim under 42 U.S.C. §§ 1981, 1982 and 1985(3), the Motion to Dismiss should be denied.

I. PLAINTIFFS STATE A CLAIM UNDER 42 U.S.C. § 1981 BECAUSE DEFENDANTS' DESECRATION OF SHAARE TEFILA SYNAGOGUE WAS MOTIVATED BY RACIAL ANIMUS.

Section 1981 originated as part of the Civil Rights Act of 1866, which guarantees in pertinent part:

> all persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and *to the full and equal benefit of all laws* and proceedings *for the security of persons and property* as is enjoyed by white citizens. . . .

42 U.S.C. § 1981 (1982). The Supreme Court has construed the phrase "as is enjoyed by white citizens" to emphasize the "racial character" of the rights being protected. *Georgia v. Rachel*, 384 U.S. 780, 791 (1966); *accord, McDonald v. Santa Fe Trail Transportation Co.*, 427 U.S. 273, 287 (1976).

Defendant Remer's primary argument that plaintiffs are asserting a section 1981 claim "because of their Jewish faith" (Motion to Dismiss ["Motion"] at 5) rather than because of racial bias fundamentally mischaracterizes plaintiffs' Complaint and defendants' conduct. Plaintiffs intend to prove at trial that defendants' conduct was motivated by racial prejudice involving the false and abhorrent notion that Jews are a distinct and inferior race. As shown in part A below, the record already convincingly demonstrates that defendants were motivated by racial animus. In any event, as also shown in part A, the allegations of the Complaint are sufficient to entitle plaintiffs to make their showing at trial.

A. Plaintiffs' Complaint Sufficiently Alleges and the Record Shows that Defendants' Conduct Was Racially Motivated and Thus Is Cognizable Under Section 1981.

Defendant Remer's claim that plaintiffs' Complaint contains "no allegation of racial discrimination" (Motion at 5) is simply untrue. Under both the section 1981 and section 1982 counts of their Complaint, plaintiffs allege that "[d]efendants' desecration of the synagogue was motivated by racial prejudice. . . ." (Complaint, ¶¶ 19, 21.) It is this

racial prejudice which forms the basis for plaintiffs' causes of action under section 1981 and section 1982.

Defendant Remer's contention that defendants' acts on the night of November 1, 1982 are not cognizable under section 1981 because "Jews simply are not members of a distinct race" (Motion at 5) ignores the crucial element of a section 1981 claim—racial animus.[1] Even though plaintiffs are not members of a non-white race,[2] the racial animus requirement is satisfied if defendants are motivated by a *perception* that plaintiffs are racially distinct. *Garcia v. Gardner's Nurseries, Inc.*, 585 F. Supp. 369, 375 (D. Conn. 1984) (Hispanics of Puerto Rican descent are within protection of section 1981 because of perception that they are non-white); *Madrigal v. Certainteed Corp.*, 508 F. Supp. 310, 311 (W.D. Mo. 1981) (Mexican-American stated a valid claim under section 1981 because of racial perception). *Accord, Manzanares v. Safeway Stores, Inc.*, 593 F.2d 968, 970-72 (10th Cir. 1979); *Petrone v. City of Reading*, 541 F. Supp. 735, 738 (E.D. Pa. 1982); *Ortiz v. Bank of America*, 547 F. Supp. 562-65 (E.D. Ca. 1982).

A "case-by-case" approach is appropriate to determine whether defendants' acts were in fact characterized by racial animus. *Carrillo v. Illinois Bell Telephone Co.*, 538 F. Supp. 793, 796 (N.D. Ill. 1982). *Accord, Lopez v. Sears,*

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[1] *See Apodaca v. General Electric Co.*, 445 F. Supp. 821, 823 (D.N.M. 1978) ("The courts . . . have allowed Spanish-surnamed plaintiffs the opportunity to plead, and attempt at . . . future trial to prove, that the discrimination against them was motivated by a racial animus."); *accord, Ortiz v. Bank of America*, 547 F. Supp. 550, 562 (E.D. Ca. 1982); *Lopez v. Sears, Roebuck, and Co.*, 493 F. Supp. 801, 807 (D.Md. 1980); *Enriquez v. Honeywell*, 431 F. Supp. 901, 906 (N.D. Okla. 1977).

[2] The Supreme Court has decided, after a lengthy examination of the legislative history of section 1981, that whites as well as non-whites may obtain relief under section 1981. *McDonald v. Santa Fe Trail Transportation Co.*, 427 U.S. 273, 287-96 (1976). *See also Fiedler v. Marumsco Christian School*, 631 F.2d 1144 (4th Cir. 1980); *Manzanares v. Safeway Stores, Inc.*, 593 F.2d 968 (10th Cir. 1979).

Roebuck and Co., 493 F. Supp. 801, 807 (D. Md. 1980). As one court has stated: "[T]he issues as to defendant's perception and animus are factual and are not to be determined by the court from the pleadings." *Apodaca v. General Electric Co.*, 445 F. Supp. 821, 823 (D. N.M. 1978).

In the present case, defendants' perception of Jews as a separate and inferior race is crystal clear. The slogans and symbols which defendants painted on the synagogue vividly reveal defendants' identification with anti-Semitic ideologies which hold as a basic tenet that Jews are not members of the "white race."[3]

The tragic legacy of Nazi Germany and the systematic killing of over six million Jews in the Holocaust was invoked by defendants' painting of swastikas, an eagle over a swastika, and the words "DEATH TO THE JUDE," "IN, TAKE A SHOWER JEW," "TOTEN KAMF RABAND" and "DEAD JEW" on the synagogue walls. *See* Tab A and Attachments 1-6. Earlier on the evening of November 1, 1982, defendants spray-painted the slogans "White Power" and "Arian [*sic*] Brotherhood" on a Drug Fair. It was at the Drug Fair that one of the defendants suggested: "Somebody should do that on a synagogue." Remer trial testimony (Tab B) at 57.

Discovery and investigation in this case, although not complete, already show that defendants were aware of the association of the words and symbols they painted with Nazi ideology. Defendants have identified the swastika as a Nazi symbol in sworn testimony. Remer trial testimony

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[3] That Nazism and other forms of anti-Semitism are motivated by racial prejudice has been judicially recognized. *See Banker v. Time Chemical, Inc.*, 579 F. Supp. 1183, 1186 (N.D. Ill. 1983) ("The vicious anti-Semitism directed against the Jews of Nazi Germany, for example, was racially motivated. . . ."); *Ortiz v. Bank of America*, 547 F. Supp. 550, 567 (E.D. Ca. 1982) ("The history of 'racial prejudice' against Jews throughout Europe and in this country appears to be so well known as almost not to require documentation").

(Tab B) at 53; Hunt testimony (Tab C) at 64, 92; Cobb testimony (Tab D) at 27; Heine testimony (Tab E) at 51. Defendants also have identified the eagle painted at the Drug Fair as a Nazi eagle. Hunt testimony (Tab C) at 61; Cobb testimony (Tab D) at 27; Heine testimony (Tab E) at 51; Queen testimony (Tab F) at 21.

Various defendants also recognize that the slogans painted on the synagogue refer back to the extermination of Jews during World War II. Defendant Hunt testified as follows:

* * * *

> Q. In Exhibit 8 you see a swastika and the words, "Dead Jew." I'd like to ask you what a swatiska next to the phrase, "Dead Jew," means to you.
>
> A. I don't know. I guess—it's symbolizing the Nazis, I guess, and then knowing what they did to the Jews, "Dead Jew" would probably go with a swatiska.
>
> Q. Tell me what they did to the Jews, please.
>
> A. Exterminated them.

Hunt testimony (Tab C) at 93-94.

Defendant Cobb also connected the slogans painted on the synagogue with Nazi activity during World War II:

> Q. The last exhibit, Exhibit J, has a picture. Can you tell me what that picture says?
>
> A. It says, "In" and "Take a shower Jew."
>
> Q. Do you know what the historical significance of take a shower Jew is?
>
> A. I guess that's how they executed some of the Jews in World War II.

Q. How?

A. I guess they made them take a shower and poisoned them or something, gassed them.

Cobb testimony (Tab D) at 58-59.

Defendant Heine testified similarly;

Q. What do you think about when you see the phrase, "Dead Jew?"

A. About the Holocaust.

Heine testimony (Tab E) at 76.

Various defendants also have testified that there was discussion among the defendants during the defacement of the Drug Fair and the synagogue about the Nazis. Defendant Cobb testified about comments made by defendant Remer:

Q. Were any of the defendants knowledgeable enough about Nazi Germany that they would know this word [Jude]?

A. The only person I could think of is Remer.

Q. How was he knowledgeable about Nazi Germany?

A. He talked about it a lot that night.

Cobb testimony (Tab D) at 55.

Defendant Heine also testified that defendant Remer talked about the Nazis during the course of the painting on November 1:

A. I don't know exactly what Michael Remer said, but he was saying something about some things that he was doing. But it had to do with Nazis and stuff. He was talking about like where it took place in the Holocaust or something. . . .

Heine testimony (Tab E) at 40. *See also id.* at 78.

A basic tenet of the Nazi Party in Germany was that Jews are not part of the white, or Aryan, race. Wolfe Declaration (Tab G) ¶ 7. This principle of the racial inferiority of Jews was stated in the Nazi Party Program of February 24, 1920 and incorporated into law by the Nuremberg Laws. *Id.* ¶ 7 and Attachments B and C. The basis for Hitler's virulent anti-Semitism and program to exterminate the Jews was the concept that Jews are racially distinct:

> The Jews has always been a people with definite racial characteristics and never a religion. . . .

A. Hitler, *Mein Kampf* (R. Manheim trans. 1943) 306.

> The foremost connoisseurs of . . . the possibilities in the use of falsehood and slander have always been the Jews; for after all, their whole existence is based on one single great lie, to wit, that they are a religious community while actually they are a race - and what a race!

Id. at 232.

> The Jewish state was never spacially limited in itself, but universally unlimited as to space, though restricted in the sense of embracing but one race. . . . It is one of the most ingenious tricks that was ever devised, to make this state sail under the flag of "religion," thus assuring it of the tolerance which the Aryan is always ready to accord a religious creed. For actually the Mosaic religion is nothing other than a doctrine for the preservation of the Jewish race. . . .

Id. at 150.

The Nuremberg Laws of September 15, 1935 and November 14, 1935 raised this notion to a legal command: Jews were declared a separate race and denied the rights

of German citizens. Wolfe Declaration (Tab G) ¶ 7 and Attachment C.

Neo-Nazi groups in this country adhere to the same warped view that Jews are not members of the white race.[4] For example, the National Socialist Party of America views itself as a successor to Hitler's National Socialist movement.[5] Among its "fundamental principles" is belief in "The Jew as the Ultimate Enemy." The official party newspaper expresses this principle in the following terms:

> The single serious enemy facing the White man is the Jew. The Jews are not a religion, they are an Asiatic *race*, locked in mortal conflict with Aryan man which has lasted for millennia, and which will continue until one of the two combat peoples is extinct.

The New Order, March 1979, at 3 (emphasis in original).

Neo-Nazi hate literature in the United States is rife with racist references to Jews. For example, *Aryan Nations*, the official publication of a neo-Nazi group of the same name, has exhorted its readers: "Aryans Awake! Jews are the Race of Satan!" *Aryan Nations*, No. 30 (1979), at 8.

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[4] One source of the view that Jews are not of the "White race" is a supposedly Bible-based two-seed theory, according to which Eve mated with two sexual partners who fathered her children:

> With Adam, her legitimate mate, Eve gave birth to the white race. With Satan as the father, Eve conceived Cain and a whole race of eternally damned devils. Those "children of Satan" are, of course, the Jews who, in different combinations and permutations, are related to every "mongrel" race in the world. (That is, every non-white.) And "white," as . . . the Neo-Nazis use the word, does not mean "Caucasian."

P. Lake, "Inside the American Nazi Party," *The Rebel*, January 30, 1984, at 47.

[5] The first "fundamental principle" of American National Socialism is "Acceptance of Adolf Hitler." *The New Order*, March 1979, at 3.

The magazine quoted a "Romanian patriot" named Corneliu Z. Codreanu to explain the program of the Aryan Nations movement:

> There is no hope for the White race, if it does not immediately come to the grim realization that the Jewish powers who presently rule over the Western nations desire and work toward the absolute destruction of White men everywhere. The Jews and their surrogates are aware of the tremendous regenerative capabilities of the Aryan race, and that is why they try to force mongrelization on the White race, especially in Britain and America: from racial bastardization there can be no hope of return to genetic purity and vitality.

Aryan Nations, No. 32 (1979), at 2, 7.

In perpetrating hate violence, neo-Nazis have identified Jews as targets because Jews are perceived as non-white. For example:

> [I]n Houston, Texas, in December, 1977, the local unit of the National Socialist White Workers Party, through its recorded telephone message, offered an award of $5,000 "for every non-white killed during an attack on a white person." Defending the award, Nazi spokesman Dennis Milem stated it was time "for an all-out war for whites against non-whites, and that includes Jews."

Anti-Defamation League of B'nai B'rith, 24 *Facts,* No. 2 (March 1978), at 7.

In sworn depositions, several defendants have testified to an understanding that the symbols and slogans painted by defendants on the Drug Fair and the synagogue are the products of an ideology that extols a superior race, a "white race," which excludes Jews. Defendant Hunt testified:

> Q. How familiar are you with the Nazi Party in Germany in the 1930's and '40's?
>
> A. Not familiar at all.
>
> Q. Do you know anything about their activities?
>
> A. Yeah, I do know, like I said, on TV you hear about them. I guess I must have learned about them in history class, you know. Everybody does. That there were Germans that wanted a superior race or something, you know, create - you hear about all these doctors and stuff like that trying to create a superior race. So the Nazis killed the Jews and stuff like that.

Hunt testimony (Tab C) at 66.

When asked why he thought a Jew seeing the phrase "Dead Jew" painted on a synagogue would feel uncomfortable, defendant Hunt replied: "It's an insult to your race.". Hunt testimony (Tab C) at 94.

Defendant Queen testified to his understanding that the slogan "Aryan Brotherhood" (painted by defendants on the Drug Fair as "Arian [sic] Brotherhood") reflected a Nazi racist ideology that excluded Jews from the "white race":

> Q. Do you understand what that ["Aryan Brotherhood"] means?
>
> A. Yes.
>
> Q. What does that mean to you?
>
> A. I guess the brotherhood of blonde hair, blue eyed people, I guess.
>
> Q. So, in other words, it would be the brotherhood of people, whites who are other than Jews?
>
> A. Yes.
>
> Q. Do you understand or know that the Ayran [*sic*] Brotherhood is associated with Nazism?

A. Yes.

Q. So that slogan is similar to what we discussed before with respect to white power, that it's a related notion?

A. Yes.

Q. That there is some superiority in Ayran [*sic*] people, meaning white non-Jews?

A. Yes.

Queen testimony (Tab F) at 21-22.

Defendant Heine offered the following explanation of Nazi racist ideology:

Q. Are you at all familiar with the rise of the Nazi Party in Germany in the 1930's?

A. Mm hm.

Q. Can you tell us what you know?

A. Not too well in depth, but from what I know from books, they wanted to develop a superior race. And that's all I know.

Q. Do you know what race that would be?

A. Well, they described it as being tall, white hair, and real muscular, I guess. That's basically what I hear.

Q. Do you know if that would include blacks?

A. I don't think it would. They wanted a specific race. They wanted a specific look for the race.

Q. Do you know if that would include Jews?

A. No, they were against Jews. That's what they didn't want, I guess.

Q. So you would say that the Nazi race is a different race from the Jewish race?

A. Yeah. Yes, I would.

Heine testimony (Tab E) at 52-53.

Defendant Cobb testified that defendant Remer spoke about the white race while he was defacing the Drug Fair:

> Q. To the right of that eagle is the term "Aryan brotherhood."
>
> A. That's what he [Remer] was talking about. I didn't know what it meant but that's what he was talking about, the white race or something like that.
>
> Q. How did Aryan [B]rotherhood and white race go together?
>
> A. I'm not sure. He was just talking about that. I don't even know what Aryan means.
>
> Q. But that term Aryan brotherhood suggests white race to you?
>
> A. Yes, from what I understand what Remer was talking about.
>
> * * *
>
> Q. Can you tell me what you remember of his [Remer's] conversation about the Jewish people?
>
> A. I don't know. I can't remember. He was saying about like the white race or something like that. . . .

Cobb Testimony (Tab D) at 29, 32.

In addition to Nazi slogans and symbols, defendants defaced the synagogue of Shaare Tefila Congregation with the words "Ku Klux Klan" and a burning cross, which is

the symbol of the Klan.[6] Like the Nazis, Klan members view Jews as racially distinct from whites. David Chalmers, one of the foremost authorities on the Ku Klux Klan, has attested that "a prevalent belief among the various Ku Klux Klan groups is that Jewish people are racially distinct from whites." Tab H, ¶ 5. This is supported by other studies:

> The fundamental theme of Klan ideology is the racist doctrine of "white supremacy," a concept that has motivated the hooded orders since their inception. It serves as justification for bigotry and violence against blacks, Jews, Hispanics, Orientals and other minorities.

Anti-Defamation League of B'nai B'rith, *Hate Groups in America: A Record of Bigotry and Violence,* at 17.

In *The Thunderbolt,* the official publication of the National States Rights Party, which is ideologically linked to the Klan, J.B. Stoner, the party's national chairman, distinguished Jews from whites:

> The negro [*sic*] is a violent enemy and he is a biological enemy because negro [*sic*] blood destroys White blood when the two are mixed together. However, the negro [*sic*] is not the enemy. The Jew is THE enemy of our White Race and the Jew is using the negro [*sic*] in an effort to destroy the White Race that he so passionately hates.

The Thunderbolt, October 1973.

Defendants have testified in depositions to their understanding of the anti-Semitic nature of Klan activity. Heine

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[6] Defendants have testified to their understanding that the burning cross is a symbol of the Ku Klux Klan. Hunt testimony (Tab C) at 71-73; Cobb testimony (Tab D) at 34; Heine testimony (Tab E) at 47. *See* Chalmers Declaration (Tab H) ¶ 6.

testimony (Tab E) at 46; Queen testimony (Tab F) at 19. Defendant Heine testified specifically to his understanding that the Klan views Jews as racially distinct:

> Q. Can you tell me anything else you know about the Klu [*sic*] Klux Klan?
>
> A. That's all I know of. Just what I've read and what obviously is known about them. That's all I know.
>
> Q. What is obviously known about them?
>
> A. They're prejudiced. *They're just against black people and Jewish people and I guess some other races or something.* But that's all I know of them.

Heine testimony (Tab E) at 47 (emphasis added).

In sum, the nature of the symbols and slogans painted on the synagogue by defendants, the history of those symbols and slogans as emblems of racial oppression of Jews, and defendants' realization of that history, are ample bases for a finder of fact to conclude that the desecration of the synagogue was the product of a racial animus against plaintiffs because they are Jews.[7]

Moreover, numerous courts have held that the mere allegation of discrimination motivated by racial character or

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[7] Because matters outside the pleadings are submitted with this Opposition, the Motion to Dismiss should be treated as one for summary judgment. Fed. R. Civ. P. 12(b). Under the standards in this Circuit, a motion for summary judgment "should be granted only where it is perfectly clear that no issue of fact is involved and inquiry into the facts is not desirable to clarify the application of the law." *Stevens v. Howard D. Johnson Co.*, 181 F.2d 390, 394 (4th Cir. 1950). Summary judgment should be denied "even where there is no dispute as to the evidentiary facts in the case but only as to the conclusions to be drawn therefrom." *Id.* The non-moving party is entitled to the benefit of all reasonable doubts concerning disputed facts and inferences. *Adickes v. Kress & Co.*, 398 U.S. 144, 158-59 (1970); *Cole v. Cole*, 633 F.2d 1083, 1089 (4th Cir. 1980).

racial animus is sufficient to withstand a motion to dismiss. For example, in *Lopez v. Sears, Roebuck, and Co.*, 493 F. Supp. 801 (D. Md. 1980), the court denied an employer's motion to dismiss a Hispanic-surnamed employee's section 1981 claim asserting discriminatory employment practices because "the plaintiff here has already alleged racial animus as a basis for suit." *Id.* at 807. Numerous decisions sustain section 1981 claims by members of ethnic or national origin groups which are not ordinarily perceived as racially distinct, provided the plaintiffs allege that the discrimination was "racial" in character. *See, e.g., Garcia v. Gardner's Nurseries, Inc.*, 585 F. Supp. 369 (D. Conn. 1984) (Puerto Rican-American); *Banker v. Time Chemical, Inc.*, 579 F. Supp. 1183 (N.D. Ill. 1983) (East Indian-American); *Pollard v. City of Hartford*, 539 F. Supp. 1156 (D. Conn. 1982) (Hispanic); *Tayyari v. New Mexico State University*, 495 F. Supp. 1365 (D. N.M. 1980) (Iranian); *Khawja v. Wyatt*, 494 F. Supp. 302 (W.D. N.Y. 1980) (Pakistani-American); *Apodaca v. General Electric Co.* (D. N.M. 1978) (Spanish-surnamed American); *Budinsky v. Corning Glass Works*, 425 F. Supp. 786 (W.D. Pa. 1977) (Slavik-American); *Cubes v. Rapid American Corp.*, 420 F. Supp. 663 (E.D. Pa. 1976) (Cuban-American).

In addition, Chief Judge Kaufman of this Court entered an Order on a Motion for Default Judgment in *Tolson v. Aicheson*, Civ. No. K-78-1120, holding that defendant's conduct in burning crosses on the property of a black family, Beth Torah Congregation and the B'nai B'rith Hillel Foundation at the University of Maryland violated 42 U.S.C. §§ 1981, 1982 and 1985(3), among other statutes. Order of April 21, 1982. The injunctive relief ordered by Judge Kaufman prohibited defendant from further acts of harassment on the property of Jewish persons and congregations as well as that of blacks. *Id.*

Plaintiffs' allegations that defendants' acts were motivated by racial discrimination must be taken as true in ruling on this Motion to Dismiss. *Gladstone, Realtors v.*

Village of Bellwood, 441 U.S. 91, 115 (1979). What defendant Remer dismisses as a "pleading artifice" (Motion at 5) is in fact a judicially recognized basis for relief under section 1981.

B. State Action Need Not Be Alleged in Order to State a Claim Under 42 U.S.C. § 1981.

Contrary to defendant Remer's assertion in paragraph 2 of the Motion to Dismiss, there is no requirement of "state action" to make out a claim under the "full and equal benefits" clause of 42 U.S.C. § 1981. This point of law is controlled by the holdings in *Jones v. Alfred H. Mayer Co.,* 392 U.S. 409 (1968) and its progeny.

In *Jones,* white defendants had refused to sell black plaintiffs a home on racially-motivated grounds. At issue in *Jones* was whether Congress intended in enacting section 1 of the Civil Rights Act of 1866 (the predecessor statute of sections 1981 and 1982) to prohibit only governmental interference with the civil rights protected by that statute, or whether it also sought to prohibit private racially-motivated acts.[8] The Court reviewed the congressional debates over the Act of 1866, and found abundant and conclusive evidence that Congress' legislative intent

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[8] Section 1 provided, in pertinent part:

> [A]ll persons . . . shall have the same right, in every State and Territory in the United States, to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains, and penalties, and to none other. . . .

Act of April 9, 1866, c.31, § 1, 14 Stat. 27.

The evolution of section 1 of the Civil Rights Act of 1866 into the present-day sections 1981 and 1982 is explained in *Jones,* 392 U.S. at 422 n.28; *Tillman v. Wheaton-Haven Recreation Ass'n,* 410 U.S. 431, 439-40 n.11 (1973); and *Runyon v. McCrary,* 427 U.S. 160, 168 n.8 (1976).

embraced prohibition of private actions which transgressed the rights listed in section 1 of the Act. 392 U.S. at 427-36. The *Jones* Court concluded:

> In light of the concerns that led Congress to adopt it and the contents of the debates that preceded its passage, it is clear that the Act [of 1866] was designed to do just what its terms suggest: to prohibit all racial discrimination,whether or not under color of law, with respect to the rights enumerated therein. . . .

392 U.S. at 436.

The rights enumerated in the Act of 1866, contained in Section 1, include the right "to full and equal benefit of all laws . . . for the security of person and property." The rights now protected by sections 1981 and 1982 were enumerated, seriatim, in one sentence of section 1 of the Act of 1866. The defendant's assertion that state action is a necessary component of a claim arising under one of the rights enumerated by Congress is inconsistent with the *Jones* Court's conclusion that "§ 1 [of the Act] was meant to prohibit *all* racially motivated deprivations of the rights enumerated in the statute," 392 U.S. at 426 (emphasis by the Court).

Since *Jones,* the Supreme Court has consistently reaffirmed its conclusion that Congress intended to protect the rights specified in section 1 of the Civil Rights Act of 1866, now codified in 42 U.S.C. §§ 1981 and 1982, against private as well as governmental actions. *See Runyon v. McCrary,* 427 U.S. 160, 173 (1976) ("[The view] that § 1981 does not reach private acts of racial discrimination is . . . wholly inconsistent with *Jones'* interpretation of the legislative history of § 1 of the . . . Act (citations omitted). And this consistent interpretation of the law necessarily requires the conclusion that § 1981, like § 1982, reaches private conduct"); *Johnson v. Railway Express Agency,* 421 U.S. 454, 459-60 (1975) (section 1981 affords

a federal remedy against racial discrimination in private employment); *Tillman v. Wheaton-Haven Recreation Ass'n*, 410 U.S. 431, 435, 439-40 (1973) (section 1982 reaches beyond state action, and sections 1981 and 1982 should be construed together since they are both traceable to section 1 of the Act); *District of Columbia v. Carter*, 409 U.S. 418, 422 (1973) (since the dangers of private discrimination were a focal point of Congress' concern in the 1866 Act, section 1982 applies to all racial discrimination in the sale or rental of property); *Sullivan v. Little Hunting Park*, 396 U.S. 229, 237 (1969) (a narrow construction of a right enumerated would be quite inconsistent with the broad and sweeping nature of the protection meant to be afforded by section 1 of the Act).[9]

There is considerable authority from federal district courts which have faced the issue that state action is not required to state a claim under the "full and equal benefits" clause of section 1981.[10] *See Vietnamese Fishermen's*

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[9] In an analogous civil rights context, the Supreme Court noted that equal protection of the laws can be impaired as effectively by private actors as by the state. In *Griffin v. Breckenridge*, 403 U.S. 88 (1970), in construing whether purely private conspiracies might constitute deprivations of "the equal protection of the laws, and equal privileges and immunities under the laws" under section 1985(3), the Court wrote:

> [T]here is nothing inherent in the phrase [equal protection of the laws] that requires the action working the deprivation to come from the State (citation omitted). Indeed, the failure to mention any such requisite can be viewed as an important indication of congressional intent to speak in § 1985(3) of *all* deprivations of "equal protection of the laws" and "equal privileges and immunities under the laws," whatever their source.

403 U.S. at 97.

[10] Defendant Remer asserts that cases arising under the "equal benefits" clause "typically' are challenging some sort of governmental action, and notes five such cases. (Motion at 6-7.) None of the cited cases holds, nor could such a case properly hold under *Jones* and its progeny, that there is a "state action" limitation on claims arising under the "full and equal benefits" clause.

Ass'n v. Knights of Ku Klux Klan, 518 F. Supp. 993, 1008 (D. Tex. 1981) ("[i]t is well established that the 'full and equal benefit of all laws' guarantee of § 1981 applies to private action"); *Hernandez v. Erlenbusch*, 368 F. Supp. 752, 755 (D. Or. 1973); *Central Presbyterian Church v. Black Liberation Front*, 303 F. Supp. 894, 897-901 (E.D. Mo. 1969); *Gannon v. Action*, 303 F. Supp. 1240, 1245 (E.D. Mo. 1969), *modified on other grounds*, 450 F.2d 1227, 1238 (8th Cir. 1971).

In support of the theory that state action must be alleged in this case, Remer cites dictum from *Mahone v. Waddle*, 564 F.2d 1018 (3rd Cir. 1977), *cert. denied*, 438 U.S. 904 (1978). *Mahone* was a state action case, however, *id.* at 1030. Moreover, the *Mahone* approach is plainly at odds with the Supreme Court's discussion in *Jones* of the history of the Act of 1866 and its conclusion that the Act "was designed to . . . prohibit all racial discrimination, whether or not under color of law, with respect to the rights enumerated therein." 392 U.S. at 436. This Court is bound by the Supreme Court's construction of the Civil Rights Act of 1866 in *Jones*, which noted that "history leaves no doubt that, if we are to give [the law] the scope that its origins dictate, we must accord it a sweep as broad as its language" (citation omitted). 392 U.S. at 437.[11]

The *Mahone* court simply erred in drawing the summary conclusion that only the state is capable of denying indi-

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[11] The other principal authority cited by defendant Remer in support of the "state action" theory, *Eggleston v. Prince Edward Volunteer Rescue Squad, Inc.*, 569 F. Supp. 1344 (E.D. Va. 1983), *aff'd*, 742 F.2d 1448 (4th Cir. 1984), simply applies the *Mahone* dictum, without offering any additional analysis or support. The Fourth Circuit in its unpublished opinion affirming the district court expressly declined to reach the state action issue. Slip op. at 4. Like *Mahone*, *Eggleston* is inconsistent with *Jones* and its progeny.

viduals the full and equal benefit of the law.[12] Private racially motivated violations of laws that are enacted "for the security of persons and property" necessarily deprive the victims of the full and equal benefit of those laws. Even if the state enacts and enforces laws in a non-discriminatory manner, the fact remains that the victims have suffered a loss of the full and equal benefits that the laws are intended to provide. Specifically, in this case, the racially-motivated trespass and other acts committed by the defendants caused extreme mental and emotional distress to the plaintiffs and damage to the plaintiffs' property. This distress and damage, although caused by private persons, constitutes a deprivation of the full and equal benefit of laws for the security of persons and property.

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[12] The *Mahone* decision has been criticized on this basis in the course of an analysis of section 1981 jurisprudence:

> Congress intended the *entire* Civil Rights Act of 1866 to apply to private conduct. There is no historical basis for imposing a state action requirement on selected portions of the statute, especially since they comprise a single sentence. . . .
>
> The inferences to be drawn from the statutory language are not so clear as the *Mahone* court suggests. Accepting the premise that the state is the sole *source* of law does not necessarily lead to the conclusion that only the state can *deprive* a citizen of the equal benefit of the laws. A government may establish "laws and proceedings" that are fair as between all citizens, but a private individual can interfere with this equality so as to prevent another from enjoying the full and equal benefit of those laws. . . .[P]rivate citizens can and do deprive each other of the full and equal benefit of the laws. . . .

Comment, *Developments in the Law - Section 1981,* 15 Harv. C.R.-C.L.L. Rev. 29, 136, 138 (1980) (emphasis in original) (footnotes omitted).

II. PLAINTIFFS STATE A CLAIM UNDER 42 U.S.C. § 1982 BECAUSE DEFENDANTS' DESECRATION OF THE SYNAGOGUE OF SHAARE TEFILA CONGREGATION WAS MOTIVATED BY RACIAL ANIMUS.

Defendant Remer makes the identical argument against the application of section 1982 to the present case as he made against the application of section 1981. (Motion at 9-12.) By its terms, section 1982 guarantees the right to "hold . . . real and personal property" and, like section 1981, refers to protection of rights "enjoyed by white citizens." Because of this similar language and the fact that both sections 1981 and 1982 originated in section 1 of the Civil Rights Act of 1866, courts have construed the sections in a similar fashion. The Supreme Court declared that "[i]n light of the historical interrelationship between § 1981 and § 1982 [there is] no reason to construe these sections differently. . . ." *Runyon v. McCrary,* 427 U.S. 160, 171 (1976), quoting *Tillman v. Wheaton-Haven Recreation Ass'n,* 410 U.S. 431, 440 (1973). *Accord, McCrary v. Runyon,* 515 F.2d 1082, 1087 (4th Cir. 1975). Consequently, defendant Remer's arguments against the application of section 1982 to the present case must fail for the same reasons that his argument against the application of section 1981 fails. *See* part I.A., *supra.*

As with their cause of action under section 1981, plaintiffs' cause of action under section 1982 is not based upon religious discrimination. It is based upon racial discrimination. Although defendant Remer contends that plaintiffs' Complaint contains "no allegation of racial discrimination" (Motion at 11), the contention is simply untrue. Plaintiffs' Complaint explicitly states in the section 1982 count that "[d]efendants' desecration of the synagogue was motivated by racial prejudice in that defendants perceive plaintiffs as racially distinct because they are Jews." Complaint, ¶ 21. Because the slogans and symbols sprayed on the walls of the synagogue are prod-

ucts of racial animus, defendants' acts are cognizable under section 1982, which protects plaintiffs' right to hold real property.[13]

The two major cases which defendant Remer cites in support of his argument against the applicability of section 1982 to the present case are inapposite. (Motion at 11-12.) In *Weiss v. Willow Tree Civic Ass'n,* 467 F. Supp. 803 (S.D.N.Y. 1979), Hasidic Jews brought suit alleging violations of section 1982 and section 1985(3) against a civic association for harassing them and delaying their attempt to establish a housing development. Although plaintiffs' complaint alleged that defendants' conduct was directed against them because of "race and religion", plaintiffs did not allege or offer in opposition to the motion to dismiss any specific facts indicating that the discrimination against them was racial in character. There was no showing in *Weiss,* as there has been in this case, of the extent to which the conduct of defendants was based on a perception of Jews as a distinct and inferior race. Similarly, the plaintiff in *Schetter v. Heim,* 300 F. Supp. 1070 (E.D. Wis. 1969) failed to allege any racial discrimination whatsoever. *Id.* at 1073.

Because it is racial prejudice which forms the basis for plaintiffs' cause of action under section 1982, as evidenced by the facts set forth in part I.A. above, plaintiffs have stated a valid claim under section 1982.

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[13] Acts of racial discrimination occurring on the property of a house of worship are cognizable under section 1982. *See Gannon v. Action,* 303 F. Supp. 1240 (E.D. Mo. 1969), *aff'd in part and remanded in part on other grounds,* 450 F.2d 1227 (8th Cir. 1971) (disruption of religious services of a predominantly white parish by an organized black group violated section 1981 and section 1982); *Central Presbyterian Church v. Black Liberation Front,* 303 F. Supp. 901 (E.D. Mo. 1969) (similar holding).

III. PLAINTIFFS STATE A CLAIM UNDER 42 U.S.C. § 1985(3) BECAUSE DEFENDANTS CONSPIRED TO DENY PLAINTIFFS OF THE EQUAL PROTECTION OF THE LAWS OR EQUAL PRIVILEGES AND IMMUNITIES UNDER THE LAWS.

Count III of plaintiffs' Complaint states a cause of action under 42 U.S.C. § 1985(3), which provides a remedy to victims of a conspiracy to deprive them of the equal protection of the laws or equal privileges and immunities under the laws. The Supreme Court in *Griffin v. Breckenridge*, 403 U.S. 88 (1971) established a four-part test which plaintiffs must satisfy to present a valid claim under section 1985(3). Plaintiffs must allege and prove: (1) a conspiracy; (2) for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; (3) whereby a person is either (a) injured in his person or property, or (b) deprived of any right or privilege of a citizen of the United States. 403 U.S. at 102-03. Defendant Remer challenges only the sufficiency of plaintiffs' allegations to meet part (2) of the *Griffin* test.

In order to satisfy part (2) of the *Griffin* test, a claimant must demonstrate that certain independent or "predicate" rights have been violated. Plaintiffs have alleged, and are prepared to prove, the violation of predicate rights derived from the federal Constitution, federal statutes, and state law. Because plaintiffs have presented a colorable claim under all three sources of right, as more fully set forth below, the motion to dismiss must be denied.

A. Plaintiffs Have Stated a Section 1985(3) Claim for Violation of Their Federal Constitutional Right to Interstate Travel.

Federal constitutional rights clearly are adequate predicate rights in a section 1985(3) action. *Great American Federal Savings & Loan Ass'n v. Novotny*, 442 U.S. 366,

370 n.6 (1979). The right to travel has been recognized as a basic constitutional right secured against violation by private parties. *Griffin,* 403 U.S. at 105-07; *United States v. Guest,* 383 U.S. 745, 757-60 & n.17 (1966). The facts alleged in plaintiffs' Complaint are sufficient to state a section 1985(3) claim for violation of this right.

Plaintiffs' Complaint alleges that Shaare Tefila Congregation is located in Silver Spring, Maryland and is composed of approximately 500 member families which reside in Maryland and the District of Columbia. Complaint, ¶ 3; Levin Declaration, ¶¶ 4, 5. Members also reside in Virginia. Levin Declaration, ¶ 5. The synagogue building is only 2 miles from the District of Columbia border. Levin Declaration, ¶ 4. Congregants must therefore travel over public roads and across state lines to attend services and other congregation functions.

The Complaint further alleges that defendants conspired and acted to deface the synagogue using words and symbols that vividly evoked the horrors of the Holocaust and the systematic killing of over 6 million Jews, and that in so doing, defendants intended to injure, harass and intimidate the congregants. Complaint, ¶ 11-13. Plaintiffs also allege that congregants suffered emotional distress as well as fear for the safety of the Congregation and of its synagogue. Complaint, ¶ 14. The facts adduced in discovery demonstrate that defendants knew that the words and symbols painted on the synagogue would cause congregants to be upset and fearful. Heine testimony (Tab E) at 76-77; Cobb testimony (Tab D) at 35; Hunt testimony (Tab C) at 97, 103.

These facts would permit a finder of fact to conclude that the purpose and effect of the conspiracy was to deprive District of Columbia and Virginia congregants of their right to travel into Maryland to their house of worship, or to deter Maryland congregants from associating with congregants from the District of Columbia and Vir-

ginia. Under similar circumstances, the Supreme Court in *Griffin* reversed an order dismissing the complaint in that case. The Court held that it was

> open to the petitioners to prove at trial that they had been engaging in interstate travel or intended to do so, that their federal right to travel interstate was one of the rights meant to be discriminatorily impaired by the conspiracy, that the conspirators intended to drive out-of-state civil rights workers from the State, or that they meant to deter the petitioners from associating with such persons.

403 U.S. at 106. Plaintiffs in the instant action are entitled to the same opportunity as was accorded to petitioners in *Griffin* to prove that their constitutional rights were violated.[14]

B. Plaintiffs Have Stated a Section 1985(3) Claim for Violation of Federal Statutory Rights Under 42 U.S.C. §§ 1981 and 1982.

Federal statutory rights, including rights under 42 U.S.C. §§ 1981 and 1982, are appropriate predicate rights under section 1985(3). *E.g., McNutt v. Duke Precision Dental & Orthodontic Laboratories, Inc.*, 698 F.2d 676, 680 (4th Cir. 1983) ("Section 1985(3) . . . provides a remedy for the violation of rights guaranteed by federal law. . . ."); *Witten v. A.H. Smith & Co.*, 567 F. Supp. 1063 (D. Md.

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[14] Defendant's reliance on *Hughes v. Ranger Fuel Corp.*, 467 F.2d 6 (4th Cir. 1972), is misplaced. The infirmity in plaintiffs' claim in that case was their failure to allege any class-based, invidiously discriminatory animus. The court held:

> Nowhere in their complaint do the plaintiffs base their constitutional claim on *a conspiracy generated by a class-motivated animus* to deprive them of . . . the exercise of any constitutional freedom to travel. . . .

467 F.2d at 10 (emphasis added).

1983) (federal statutory rights, specifically including rights under 42 U.S.C. § 1981, may serve as a substantive basis for redress under section 1985(3)). *Accord, Marlowe v. Fisher Body,* 489 F.2d 1057 (6th Cir. 1973).

For the reasons discussed in parts I and II above, no allegation of state action is required to make out a section 1981 claim, and plaintiffs have alleged and set forth evidence in the record that defendants' acts of discrimination were motivated by racial animus, as required by sections 1981 and 1982. Plaintiffs therefore have stated a claim under section 1985(3) for the violation of rights under section 1981 and section 1982.

C. Plaintiffs Have Stated a Section 1985(3) Claim for Violation of Rights Under Maryland Law.

Defendant Remer asserts that the rights protected by section 1985(3) are limited to federal statutory and constitutional rights and that rights owing their existence to state law are not protected under the statute. The legislative history of section 1985(3) and a substantial body of case law are to the contrary.

The Supreme Court has left open the question whether state-created rights can serve as the basis for a section 1985(3) claim. In *United Brotherhood of Carpenters and Joiners, Local 610 v. Scott,* 103 S. Ct. 3352 (1983), the district court had concluded that an alleged assault on non-union workers violated the federally-protected right of association and "encompassed violations of both the civil and criminal laws of the state of Texas, thus depriving plaintiff of the protections afforded by those laws. . . ." 103 S. Ct. at 3356. The Supreme Court, however, expressly declined to consider which rights, including state-created rights, could suffice as predicate rights under section 1985(3):

> because of [its] holding [that section 1985(3) prohibits purely private conspiracies to abridge the First Amendment] the Court of Appeals found it

> unnecessary to determine whether respondents' action could be sustained under § 1985(3) as involving a conspiracy to deprive respondents of rights, privileges, or immunities under state law or those protected against private action by the Federal Constitution or federal statutory law. Conceivably, we could remand for consideration of these possibilities or we ourselves could consider them. We take neither course. . . .

103 S. Ct. at 3358. The Court declined to consider these issues because the non-union workers had failed to show the necessary class-based, invidiously discriminatory animus required by *Griffin*.

The issue also has not been squarely faced by the Fourth Circuit. The violation of state-protected rights was not alleged in the Fourth Circuit cases cited by defendant Remer: *McNutt v. Duke Precision Dental and Orthodontic Laboratories, Inc.*, 698 F.2d 676 (4th Cir. 1983) (affirming dismissal of section 1985(3) claim for violation of rights flowing from Fourteenth Amendment in absence of state action); *Doski v. M. Goldseker Co.*, 539 F.2d 1326 (4th Cir. 1976) (affirming dismissal of sex discrimination claim under Fourteenth Amendment in absence of state action); and *Bellamy v. Mason's Stores, Inc.*, 508 F.2d 504 (4th Cir. 1974) (affirming dismissal of claim by Ku Klux Klan member on ground that right of association is not protected against private interference).[15]

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[15] Many of the other cases cited by defendant also are inapposite because they did not present state right violations. *See, e.g., Holmes v. Finney*, 631 F.2d 150, 154 n.4 (10th Cir. 1980) (finding no violation of federally protected rights in surreptitious taping of conversation, but noting that "[i]n here referring to federally protected rights, we do not feel that all consideration of state law is excluded"); *Cohen v. Illinois Institute of Technology*, 524 F.2d 818 (7th Cir. 1975), *cert. denied*, 425 U.S. 943 (1976) (affirming dismissal of section 1985(3) sex discrimination claim under Fourteenth Amendment in absence of state action);

Both the legislative history of section 1985(3) and numerous decisions construing the statute indicate that state-protected rights are appropriate predicate rights in a section 1985(3) action. The record of the legislative debate is replete with references to the potential of the Act to reach violations of state law rights. Senator Edmunds, who managed the bill on the floor of the Senate, expressed the view that the Act included conspiracies to "overthrow the Government, conspiracies to impede the course of justice, conspiracies to deprive people of the equal protection of the laws, *whatever those laws may be.*" Cong. Globe, 42d Cong., 1st Sess., 568 (April 11, 1871) (emphasis added). *See also id.* at 580 at which Sen. Edmunds explained in the course of a discussion of another section of the same bill that "equal protection of the laws" meant: "What laws? The laws of that State." Senator Morton observed during the debate:

> But it is said these crimes should be punished by the States; that they are already offenses against the laws of the States, and the matter should be left with the States. The answer to that is, that the States do not punish them; the States do not protect the rights of the people; the State courts are powerless to redress these wrongs.

Id. at 252 app. Opponents of the bill repeatedly alluded to the fact that it encompassed conspiracies to commit common law torts and state law crimes. *See, e.g., id.* at 337 (remarks of Rep. Whitthorne) (noting that Act would reach a conspiracy by a father and son to commit "a simple assault and battery"); *id.* at 352-53 (remarks of Rep. Beck) (noting potential of Act to reach "simple assault and battery by two or more persons on others in the same town, village, or neighborhood"); *id.* at 395 (remarks of Rep.

Wright v. Methodist Youth Services, Inc., 511 F. Supp. 307 (N.D. Ill. 1981) (affirming dismissal of section 1985(3) claim under Fourteenth Amendment in absence of state action).

Rainey) (noting that Act would reach violations known to the common law and the laws of every state).

The trend of the Supreme Court's analysis of the legislative history of section 1985(3) supports the view that state-protected rights are appropriate predicate rights in a section 1985(3) action. The Court observed in *Scott* that a narrowing amendment to the original Ku Klux Klan Act was proposed in the House of Representatives to limit the Act from providing a federal remedy for "all tortious, conspiratorial interferences with the rights of others." *Scott,* 103 S. Ct. at 3358, quoting *Griffin,* 403 U.S. at 101. According to the Court, the narrowing amendment "centered entirely on the animus or motivation that would be required." *Scott,* 103 S. Ct. at 3359, quoting *Griffin,* 403 U.S. at 100. As the *Griffin* Court observed:

> The constitutional shoals that would lie in the path of interpreting § 1985(3) as a general federal tort law can be avoided by giving full effect to the congressional purpose - by requiring, as an element of the cause of action, the kind of invidiously discriminatory motivation stressed by the sponsors of the limiting amendment.

403 U.S. at 102. Any concern about the breadth of section 1985(3) thus should be allayed by the requirement of an invidiously discriminatory animus and not by cutting back on the categories of predicate rights.

Various federal courts have expressly stated that state statutes are appropriate predicate rights under section 1985(3). The leading authority cited for this conclusion is *McLellan v. Mississippi Power & Light Co.,* 545 F.2d 919 (5th Cir. 1977) (en banc), where the court held that "there can only be a deprivation of the rights of a plaintiff when the action of the defendants is *otherwise* illegal." 545 F.2d at 925 (emphasis in original). Finding that the plaintiff had not attempted "to enlist the aid of any substantive state statutory provision" and that no applicable state law had

been violated, the court concluded that the plaintiff had not stated a section 1985(3) claim. 545 F.2d at 930 (footnote omitted).

The *McLellan* court found support for its independent illegality test in the facts of *Griffin,* in which the object of the conspiracy encompassed violations of both the civil and criminal laws of Mississippi, including assault and battery, false imprisonment, and infliction of mental distress. 545 F.2d at 925 & n.18, 926 & nn. 24-28. *See Griffin,* 403 U.S. at 90-91, 103. Thus, the *McLellan* court found that the violations of state civil and criminal law in *Griffin* satisfied the section 1985(3) requirements of deprivation of equal protection of the laws, an act in furtherance of the conspiracy and injury. 545 F.2d at 926 & n.28. The court noted: "[W]hile it may be true . . . that *Griffin* has in fact federalized state tort law where racial motivation is involved, at least there must be a tort before section 1985(3) may be utilized." 545 F.2d at 927 n.33.

Other federal courts, often relying on *McLellan,* have expressed support for the view that state-protected rights are appropriate predicate rights under section 1985(3). The Ninth Circuit held in *Life Insurance Co. of North America v. Reichardt,* 591 F.2d 499 (9th Cir. 1979) (en banc), that the *Griffin* test required "the deprivation of *any* legally protected right." 591 F.2d at 503 (emphasis added). The court concluded that both the state civil and criminal codes gave the plaintiff a state right or entitlement to be free from the alleged private discrimination. 591 F.2d at 504-05 & nn.12-13. The *Reichardt* court expressly rejected the more narrow construction urged by the defendants which would limit section 1985(3) to deprivations of federal rights, "as opposed to any legal rights or entitlements (including state conferred rights)." 591 F.2d at 505. In so doing, the court relied upon *Harrison v. Brooks,* 446 F.2d 404 (1st Cir. 1971), which held that property owners stated a section 1985(3) action against certain town officials for con-

spiracy to deprive owners of equal protection of the local zoning laws.

Numerous federal cases have adopted the *McLellan-Reichardt* approach. *See, e.g., People v. 11 Cornwell Co.*, 695 F.2d 34, 41-42 (2d Cir. 1982) (holding that failure to sell residence to state for use as facility for mentally retarded adults constituted deprivation of equal protection under section 1985(3) by violating New York Human Rights Law, citing *McLellan* and *Reichardt*); *Earnest v. Lowentritt*, 690 F.2d 1198, 1202 (5th Cir. 1982) (following *McLellan* analysis and noting that white mortgagees' foreclosure of mortgage given by poor black mortgagor could constitute violation of civil laws of Louisiana); *Shimman v. Frank*, 625 F.2d 80 (6th Cir. 1980) (noting that dissident member of union who was assaulted and beaten at union meeting, in violation of Ohio tort law, could collect damages under section 1985(3)). *See also Britt v. Suckle*, 453 F. Supp. 987 (E.D. Tex. 1978) (following *McLellan* analysis and holding that employee's action, claiming that employer discharged and harassed him as a result of his negligence suit against employer in violation of Texas Workman's Compensation Act, established a section 1985(2) claim); *Poirier v. Hodges*, 445 F. Supp. 838 (M.D. Fla. 1978) (following *McLellan* analysis and defining object of conspiracy in terms of independently illegal acts in furtherance of conspiracy).

Since the legislative history of section 1985(3) and the weight of authority support the conclusion that state law rights are appropriate predicate rights under the statute, plaintiffs have stated a section 1985(3) claim based on Maryland criminal and common law.

Conclusion

Because plaintiffs' Complaint states claims under 42 U.S.C. §§ 1981, 1982 and 1985(3), the Motion to Dismiss should be denied.

Respectfully submitted,

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[Exhibits A, G and H Included in Appendix to Petition for Writ of Certiorari as Exhibits E, F and G, respectively; Exhibits B through F Omitted in Printing]

[Certificate of Service Omitted in Printing]

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

CIVIL ACTION NO. R-84-880

SHAARE TEFILA CONGREGATION, *et al.*,
Plaintiffs,

v.

COBB, *et al.*,
Defendants.

[Filed Jan. 29, 1985]

REPLY TO PLAINTIFFS' OPPOSITION TO MOTION TO DISMISS

. Michael David Remer, a defendant, by his attorneys, Robert B. Barnhouse and Deborah T. Garren, submits the following reply to the Plaintiffs' Opposition to Motion to Dismiss:

I. The Complaint Does Not State A Claim For Race Discrimination Under 42 U.S.C. §1981.

In his Motion to Dismiss, defendant Remer argues for dismissal of the plaintiffs' claim under §1981 because that statute does not address discrimination on religious grounds. In response, plaintiffs essentially agree that §1981 does not prohibit religious discrimination; however, they argue that they have not alleged such discrimination. Rather, they have alleged that defendants' desecration of the synagogue was motivated by the perception, albeit a false one, that Jews are racially distinct. (*See* Plaintiffs' Opposition at 2.)[1] Plaintiffs contend that the latter alle-

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[1] Throughout this memorandum, the Plaintiffs' Opposition to Motion to Dismiss is referred to simply as Plaintiffs' Opposition.

gation is sufficient to state a §1981 claim for race discrimination. Neither the legislative history of §1981, the specific language of the statute, nor the case law construing the statute justify such a broad extension of its protection.

The legislative history of §1981 definitively shows that the statute was designed to protect blacks from race discrimination. After passage of the Thirteenth Amendment abolishing slavery, the 39th Congress recognized the need for legislation to protect and extend the rights of the newly freed slaves. Accordingly, the Civil Rights Act of 1866 was passed to protect the racial equality of the newly freed blacks.[2] Section 1 of that Act appears in its present-day form as 42 U.S.C. §1981, and the language of §1981 continues to emphasize the racial equality to which that statute, in its varying forms throughout history, always has been addressed:

> "All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property *as is enjoyed by white citizens. . .* "

(Emphasis added.)

In construing §1981 today, the courts are faced with the difficult task of developing a realistic approach to the modern interpretation of a statute which was passed a century ago. They must struggle to determine the proper application of the statute to modern forms of discrimination unforeseen by the 39th Congress when it passed the Civil Rights Act of 1866. However, they cannot lose

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[2] For a thorough discussion of the legislative history of 42 U.S.C. §1981, *see* Comment, *Developments in the Law - Section 1981*, 15 Harv. C.R.-C.L. L.Rev. 29, 35-69 (1980).

sight of the fact that the statute is limited to race discrimination. *Georgia v. Rachel,* 384 U.S. 780, 791 (1966); *Runyon v. McCrary,* 427 U.S. 160, 167 (1976).

Unfortunately, limitation of §1981 to race discrimination does not delineate clearly the boundaries of the statute's protection because the courts have yet to develop a consistent definition of "race". Certain aspects of §1981's coverage have been established clearly by the courts. For example, §1981 protects the right of black Americans to be free from racial discrimination, whether public or private. *Runyon v. McCrary, supra; Johnson v. Railway Express Agency, Inc.,* 421 U.S. 454 (1979). Likewise, the Supreme Court now has established that white Americans are protected by §1981's prohibition against race discrimination. *McDonald v. Santa Fe Trail Transportation Co.,* 427 U.S. 273 (1976).

Other aspects of §1981's coverage are more problematical. Specifically, the courts have encountered difficulties in deciding whether discrimination on account of national origin ever constitutes racial discrimination under §1981. The Supreme Court has indicated that 42 U.S.C. §1982 does not encompass national origin discrimination. *Jones v. Alfred H. Mayer Co.,* 392 U.S. 409, 413 (1968). Since §§1981 and 1982 properly are construed in a similar fashion (*see* Plaintiffs' Opposition at 26), it is likely that the Supreme Court also would hold that §1981 does not cover national origin discrimination.

Most courts have agreed that national origin discrimination, standing alone, is not covered by the statute. *Martinez v. Hazelton Research Animals, Inc.,* 430 F. Supp. 186 (D. Md. 1977); *Mouriz v. Avondale Shipyards, Inc.,* 428 F. Supp. 1025 (E.D. La. 1977); *Vasquez v. Werner Continental, Inc.,* 429 F. Supp 513 (N.D. Ill. 1977); *Budinsky v. Corning Glass Works,* 425 F. Supp. 786 (W.D. Pa. 1977); *National Assoc. of Government Employees v. Rumsfeld,* 413 F. Supp. 1224 (D.D.C. 1976); *Jones v. United Gas Im-*

provement Corp. 383 F. Supp. 420 (E.D. Pa. 1975); *Gradillas v. Hughes Aircraft Co.*, 407 F. Supp. 865 (D. Ariz. 1975); *Kurylas v. U.S. Department of Agriculture*, 373 F. Supp. 1072 (D.D.C. 1974). *See also* Annot., 43 ALR Fed. 103 (1979); Cook and Sobieski, Jr., *Civil Rights Actions* ¶ 5.08, n.14 (1984). However, confusion arises when both racial discrimination and national origin discrimination arguably are present at the same time. As one district court has noted:

> "The line between discrimination on account of race and discrimination on account of national origin may be so thin as to be indiscernible; indeed, . . . there may in some instances be overlap."

Enriquez v. Honeywell, 431 F. Supp. 901, 904 (N.D. Okla. 1977).

The courts have developed various approaches in an attempt to deal with national origin discrimination claims which are characterized as "racial". Courts typically have rejected the §1981 claims of white plaintiffs of Slavic and Italian descent. *Petrone v. Reading*, 541 F. Supp. 735 (E.D. Pa. 1982) (Italian); *Budinsky v. Corning Glass Works, supra* (Slavic); *Sokolsky v. Corning Glass Works*, 14 FEP Cases 936 (W.D. Pa. 1977) (Slavic); *Hiduchenko v. Minneapolis Medical & Diagnostic Center, Ltd.*, 467 F. Supp. 103 (D. Minn. 1979) (Ukranian). In *Budinsky v. Corning Glass Works, supra*, the court stated:

> ". . .Hispanic persons and Indians, like blacks, have been traditional victims of group discrimination, and. . .are frequently and even commonly subject to a 'racial' identification as 'non-whites'. There is accordingly both a practical need and a logical reason to extend §1981's proscription against exclusively "racial" employment discrimination to these groups of potential discriminatees.

> *The same cannot be said with regard to persons of Slavic or Italian or Jewish origin.* These groups are not so commonly identified as 'races' nor so frequently subject to that 'racial' discrimination which is the specific and exclusive target of §1981. Members of these groups. . .do not properly fall within the coverage of the statute."

(Emphasis added.) *Id.* at 788. Contrary to plaintiffs' contention (*see* Plaintiffs' Opposition at 18), the *Budinsky* decision does not support their argument for §1981 coverage in this case. In *Budinsky*, the court specifically indicated that persons of Jewish origin could not assert a national origin - race discrimination claim.

Most cases which successfully allege a national origin - race discrimination claim under §1981 involve Hispanic Americans, who are asserted to be traditional victims of discrimination and subject to the same types of discrimination as blacks. *See* Annot., 43 ALR Fed. 103 (1979). In evaluating §1981 claims, those cases focus primarily on whether plaintiffs are members of a national origin group which is commonly identified as distinct from the white majority.

For example, in *Martinez v. Hazelton Research Animals, Inc., supra*, this Court dismissed an Hispanic plaintiff's employment discrimination claim under §1981 based on his ethnic and racial background, stating;

> ". . .many people of Hispanic origin cannot be classified as 'non-whites'. Therefore, this court finds that the allegation that the plaintiff is a Hispanic male, without more, is an insufficient allegation of racial background to support an allegation of racial discrimination and thus to state a cause of action under 42 U.S.C. §1981."

Id. at 188. Similarly, in *Lopez v. Sears, Roebuck & Co.*, 493 F. Supp. 801 (D. Md. 1980), this Court denied the defendant's motion to dismiss a §1981 claim, stating:

> ". . .the plaintiff has clearly stated that the alleged discrimination is based both on nationality (Hispanic) *and race (brown).*"

(Emphasis added.) *Id.* at 807. Like many other courts, the *Lopez* court apparently focused on the plaintiff's skin color in finding that he had stated a §1981 claim for race discrimination. *See also Gonzalez v. Stanford Applied Engineering, Inc.*, 597 F.2d 1298 (9th Cir. 1979) (discrimination against persons of Mexican descent, having skin color not characteristically Caucasian, is prohibited by §1981); *Shah v. Mt. Zion Hospital and Medical Center*, 642 F.2d 268 (9th Cir. 1981) (trial judge properly granted summary judgment against East Indian plaintiff's claim because, based on personal observation, plaintiff was Caucasian); *Khawaja v. Wyatt,*, 494 F. Supp. 302 (W.D.N.Y. 1980) (Pakistani-American who contended that defendants' treatment of him was racially based (black) was permitted to allege §1981 claim – the court noted that Hispanic Americans can sue under §1981 upon evidence that there is some racial (*physiological*) component to the discrimination); *Trehan v. IBM Corp.*, 24 FEP Cases 443 (S.D.N.Y. 1980) (white East Indian was not covered by §1981).

Curiously, the plaintiffs rely on the *Lopez* decision discussed above to support their argument that a mere allegation of discrimination motivated by defendants' racial perception is sufficient to withstand a motion to dismiss the §1981 claim. As noted above, that decision does not focus on the defendant's racial perception, but rather on the racial characteristics of the plaintiff's group.

Many of the other cases relied on by plaintiffs also focus primarily on whether the plaintiffs are members of a national origin group which is commonly identified as distinct from the white majority. *Manzanares v. Safeway Stores, Inc.*, 593 F.2d 968 (10th Cir. 1979) (a group which is discriminated against because they are somehow different as compared to "white citizens" is within the scope of §1981);

Garcia v. Gardner's Nurseries, Inc., 585 F. Supp. 369 (D. Conn. 1984) (Hispanics of Puerto Rican descent are a non-white group protected by §1981); *Banker v. Time Chemical, Inc.*, 579 F. Supp. 1183 (M.D. Ill. 1983) (East Indians are frequently identified as non-whites); *Petrone v. City of Reading*, 541 F. Supp. 735 (E.D. Pa. 1982) (plaintiff's §1981 claim was denied because Italians, unlike Hispanics, are not frequently identified as non-white); *Madrigal v. Certainteed Corp.*, 508 F. Supp. 310 (W.D. Mo. 1981) (Hispanics as a group are frequently identified as non-white); *Tayyari v. New Mexico State University*, 495 F. Supp. 1365 (D.N.M. 1980) (Iranians as a group are commonly viewed as racially different from the white majority); *Aprodaca v. General Electric Co.*, 445 F. Supp. 821, 823 (D.N.M. 1978) (Spanish-surnamed plaintiffs have been victims of group discrimination); *Cubas v. Rapid American Corp.*, 420 F. Supp. 663 (E.D. Pa. 1976) (plaintiff contended that Cuban Americans may be considered a non-white racial group within §1981).

It is true that some of the district court cases cited by the plaintiffs contain language which suggests that a defendant's racial perceptions are relevant to §1981 coverage. However, contrary to the plaintiffs' statement (*see* Plaintiffs' Opposition at 17), those cases do not involve claims by national origin groups "which are not ordinarily perceived as racially distinct." Rather, as noted above, those cases emphasize the fact that the various national origin groups involved are commonly identified as racially distinct.

Plaintiffs also rely on an unpublished order entered by Chief Judge Kaufman in *Tolson v. Aitcheson*, Civil Action No. K-78-1120, to support their §1981 claim. (*See* Plaintiffs' Opposition at p. 18.) That Order does not support plaintiffs' novel theory of liability under §1981 for several reasons. The Order was entered on a motion for default judgment and was based on violations of a variety of laws — 42 U.S.C. §§1981, 1982, 1985(3), 42 U.S.C. §3617 and Mary-

land common law. There is no indication that the Court relied on §1981 in allowing the plaintiffs' action against the Jewish plaintiffs. Furthermore, the court in that case clearly did not consider or decide whether §1981 applies to Jews when defendants perceive them as racially distinct. (A copy of Chief Judge Kaufman's Order is attached hereto as Exhibit A.)

To summarize, plaintiffs rely on gratuitous language in a handful of federal district court cases involving national origin discrimination to support their contention that the mere allegation that the defendants were motivated by racial prejudice, in that they perceived Jews as racially distinct, is sufficient to defeat the Motion to Dismiss. No federal appellate court has ever focused on a defendant's subjective racial animus in evaluating the viability of a §1981 claim.[3] Furthermore, most federal district courts which have allowed §1981 suits for national origin — race discrimination have made no reference whatsoever to the individual defendant's subjective racial perceptions. *See Gomez v. Pima County*, 426 F. Supp. 816 (D. Ariz. 1976) (Mexican-American/Spanish-surnamed individuals of brown race or color who alleged that they had been discriminated against because of that race or color stated a §1981 claim); *Enriquez v. Honeywell, Inc.*, 431 F. Supp. 901(N.D. Okla. 1977) (court cannot determine on motion to dismiss whether persons of Spanish descent are caucasian or non-caucasian); *Cubas v. Rapid American Corp., Inc.*, 420 F. Supp. 663 (E.D. Pa. 1976) (discrimination against Cuban-American plaintiff may involve elements of racial discrimination since Cuban Americans may be considered a non-white group); *Puerto Rican Media Action & Educational*

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[3] The only federal appellate decision cited by plaintiffs, *Manzanares v. Safeway Stores, Inc., supra*, contained no discussion of subjective racial perceptions. To the contrary, in allowing a Mexican-American's §1981 suit, it emphasized that Mexican-Americans, as a group, allegedly were treated differently from Anglos, as a group.

Council v. Metromedia, Inc., 10 FEP Cases 1009 (S.D. N.Y. 1975); *Maldonado v. Broadcast Plaza, Inc.*, 10 FEP Cases 839 (D. Conn. 1974); (3) *Miranda v. Amalgamated Clothing Workers*, 10 FEP Cases 557 (D. N.J. 1974).

Reliance on the subjective racial perceptions of defendants in evaluating §1981 claims for national origin - race discrimination has been criticized by the courts and commentators. Thus, in *Khawaja v. Wyatt, supra*, a case relied on by the plaintiffs, the court noted that some courts look to the perceptions of the discriminators:

> "But it has been pointed out that discriminators may be 'poor anthropologists' [citation omitted] and so presumably this approach has its limits as well."

Id. at 305, n.1. *See also* Comment, *Developments in the Law - Section 1981*, 15 Harv. C.R. - C.L. L. Rev. 29, 82-90 (1980).

Even if a few courts arguably have considered the individual discriminators' racial perceptions in deciding §1981 national origin claims, that approach cannot be extended to cover the plaintiffs' §1981 claim herein. Section 1981 has never been extended to cases involving the false racial perception that Jews are members of a distinct race. To the contrary, several courts have indicated that persons of Jewish origin are not members of a group protected by §1981. *Budinsky v. Corning Glass Works, supra* at 788; *Wald v. International Brotherhood of Teamsters*, 24 FEP Cases 616, 619 (C.D. Calif. 1980) (distinguishing Hispanic national origin cases, court noted that the weight of authority supports th view that claims of discrimination against Jews do no. .ll within §1981); *Marlowe v. Fisher Body Division*, 11 FEP Cases 1357 (C.D. Mich. 1975) (Jewish worker had no §1981 claim because Jewishness is not a race.)

Plaintiffs contend that their claim is covered by §1981 because defendants, like the Nazi Party and the Ku Klux

Klan, perceived Jews as racially inferior. They do not contend that society commonly identifies Jews as racially distinct, but that two small, deviant organizations identify Jews as racially distinct. Extension of §1981's protection in the manner proposed by plaintiffs would open a veritable "Pandora's box" of §1981 claims by individuals that were never intended to be covered by the statute. If the plaintiffs' theory is correct, then anyone successfully could allege a §1981 claim merely by stating that an individual defendant, however irrationally, perceived him as racially inferior. Surely, such a result was not intended by the framers of §1981, nor would it be consonant with the courts' holdings in the national origin-race discrimination cases discussed above.

Plaintiffs have attempted to convert defendant Remer's Motion to Dismiss into a Motion for Summary Judgment by introducing affidavits and deposition testimony. (*See* Plaintiffs' Opposition at pp. 5 - 17 and n.7.) To summarize, plaintiffs argue that the individual defendants' racial perceptions are an issue of fact and that the available evidence establishes that: (1) the Nazi Party and the KKK perceive Jews as a separate and inferior race, (2) the slogans and symbols painted on the synagogue represent the anti-Semitic ideologies of the Nazi Party and the KKK, and (3) the dependants understood the meaning of those slogans and symbols and, like the Nazi Party and the KKK, perceived Jews as an inferior race. None of the factual material discussed by the plaintiffs is relevant to the Motion to Dismiss. Even if those facts are correct, the plaintiffs' §1981 claim still must be dismissed for the reasons stated above. Such a claim simply cannot be based on the subjective racial perceptions of individual defendants.[4]

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[4] Of course, in the event that the Court denies the Motion to Dismiss, defendant Remer reserves the right to challenge the facts presented by the plaintiffs by motions filed later in this case.

II. The Complaint Does Not State A Claim Under §1981's "Full and Equal Benefits" Clause Because It Does Not Allege State Action.

In his Motion to Dismiss, defendant Remer argues for dismissal of the plaintiffs' claim under §1981 because they have failed to allege state action. In response, the plaintiffs contend that §1981's "full and equal benefits" clause covers private, as well as state, action. However, they do not cite any conclusive authority in support of their position, and they simply dismiss the authority cited by defendant as "wrong." Under the circumstances, their §1981 claim under the "full and equal benefits" clause must be dismissed.

In arguing for application of the "full and equal benefits" clause to private action, the plaintiffs rely primarily on *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968) and its progeny. (*See* Plaintiffs' Opposition at pp. 19-22.) In *Jones*, the Supreme Court held that 42 U.S.C. §1982 bars private racial discrimination in the sale or rental of property. However, §1982 deals only with property rights and does not contain language analogous to the "full and equal benefits" clause of §1981. The other Supreme Court precedent cited by plaintiffs involves application of §1982 or of the contract clause of §1981. Defendant does not dispute application of the latter statutory provisions to private action.

Unlike §1982 and the contract clause of §1981, the "full and equal benefits" clause implies state action. By definition, only the government can interfere with a person's right to the "full and equal benefit of all laws." Private individuals simply are not in a position to interfere with such legal rights. Accordingly, cases arising under the "full and equal benefits" clause typically have involved some sort of governmental action. (*See* defendant's Memorandum in Support of Motion to Dismiss at pp. 6-7.)

Plaintiffs misrepresent when they state that there is considerable authority for application of the "full and equal benefits" clause to private action. (*See* Plaintiffs' Opposition at pp. 22-23.) In that regard, three of the four cases cited by plaintiffs are based on the contract clause of §1981. *Vietnamese Fishermen's Ass'n v. Knights of Ku Klux Klan*, 518 F. Supp. 993 (D. Tex. 1981) (court recognized that the Third Circuit has found that state action is implicit in "equal benefits" clause; however, it did not decide that issue since the plaintiff was protected under §1981's contract clause); *Hernandez v. Erlenbusch*, 368 F. Supp. 752 (D. Or. 1973) (court relied on §1982 and the contract clause of §1981); *Gannon v. Action*, 303 F. Supp. 1240 (E.D. Mo. 1969), *modified*, 450 F.2d 1227 (8th Cir. 1971) (court found that defendant violated plaintiff's rights under §§1981 and 1982 without discussing the "full and equal benefits" clause.)[5]

Relying on the above weak case authority and denying the correctness of the authority cited by defendants, plaintiffs attempt to stretch the obvious meaning of the "full and equal benefits" language of §1981. They argue that when defendants allegedly broke the law of trespass, they denied plaintiffs the full and equal benefit of that law. Their argument is patently absurd. Presumably, the law of trespass was designed to punish offenders and ensure recompense to their victims. There is no allegation that anyone has refused to enforce that law in the plaintiffs' behalf.

For the reasons stated above and in the Memorandum in Support of Motion to Dismiss, the plaintiffs' §1981 claim

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[5] The remaining case relied on by plaintiffs, *Central Presbyterian Church v. Black Liberation Front*, 303 F. Supp. 894 (E.D. Mo. 1969), involved a preliminary injunction proceeding under §§1981, 1982 and 1985(3). The court found that violations of all three statutes justified issuance of a preliminary injunction, and the case included only minimal discussion of the "full and equal benefits" clause.

under the "full and equal benefits" clause must be dismissed.

III. The Complaint Does Not State A §1982 Claim For Race Discrimination.

Plaintiffs make the same argument with respect to their §1982 claim as they make with respect to their §1981 claim. To reiterate, they argue that their mere allegation, that defendants' desecration of the synagogue was motivated by the false perception that Jews are racially distinct, is sufficient to withstand the Motion to Dismiss. For reasons similar to those discussed in Argument I above, the plaintiffs' argument must fail.

As noted by plaintiffs, §§1981 and 1982 typically are construed in an analogous fashion. (*See* Plaintiffs' Opposition at p. 26.) Both of those statutes were first enacted as part of the Civil Rights Act of 1866 in an effort to protect the racial equality of newly freed blacks. Section 1982, like §1981, guarantees only the same rights as are "enjoyed by white citizens." As such, it is addressed solely to race discrimination. (*See* Memorandum in Support of Motion to Dismiss at p. 10.)

Plaintiffs have not cited a single case to support their contention that a §1982 claim can be based on the subjective racial perceptions of individual defendants. Like their theory for §1981 coverage, if the plaintiffs' theory for §1982 coverage is permitted to prevail, illogical results will accrue. Under that theory anyone successfully could assert a §1982 claim by alleging that an individual defendant, however incorrectly, perceived him as racially inferior to the white majority. Such a result simply was not intended by the framers of §1981, nor is it supported by any case law under §1982. Accordingly, the plaintiffs' §1982 claim must be dismissed.

IV. This Court Lacks Subject Matter Jurisdiction Over This Action Under 42 U.S.C. §1985(3) Because The Complaint Fails To Allege A Deprivation of Rights Guaranteed By Federal Law Or the U.S. Constitution.

As noted previously, §1985(3) provides no substantive rights itself. Rather, it provides a remedy for conspiracies which deprive plaintiffs "of the equal protection of the laws, or of equal privileges and immunities under the laws." Plaintiffs contend that they have alleged a cause of action under §1985(3) based on the following "predicate" rights: (1) the federal constitutional right to interstate travel, (2) 42 U.S.C. §§1981 and 1982, and (3) Maryland criminal and common law. (*See* Plaintiffs' Opposition at pp. 28-40).[6] For the reasons discussed below and in the Memorandum in Support of Motion to Dismiss, plaintiffs have not alleged sufficient facts to show a violation of any of the "predicate" rights covered by §1985(3).

A. Plaintiffs have not stated a §1985(3) claim for violation of the federal constitutional right to interstate travel.

Plaintiffs argue that they have alleged a violation of the federal constitutional right to interstate travel because, based on the allegations in the Complaint, the Court could conclude:

> "that the purpose and effect of the conspiracy was to deprive District of Columbia and Virginia congregants of their right to travel into Maryland to their house of worship, or to deter Maryland congregants from associating with congregants from the District of Columbia and Virginia."

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[6] In Plaintiffs' Opposition, they no longer attempt to assert a violation of the First Amendment right to assemble and worship as a basis for their §1985(3) claim. Apparently, they concede that their Complaint fails to allege the state action which is necessary to prove a conspiracy to infringe First Amendment rights under §1985(3).

Plaintiffs' Opposition at p. 31. Their argument, however creative, simply does not offer a sufficient allegation of a violation of the right to interstate travel.

Significantly, this is the first time that the plaintiffs have revealed the alleged basis for any interference with the right to interstate travel. As noted in the Plaintiffs' Opposition, their Complaint merely alleged that congregant families reside in Maryland, Virginia and Delaware, and that the defendants' alleged desecration of the synagogue was intended to harass and intimidate the congregants. (*See* Plaintiffs' Opposition at p. 30.) Now, the plaintiffs contend that the court properly can infer from the above facts an interference with the right to interstate travel.

None of the cases which have allowed a §1985(3) claim for deprivation of the right to interstate travel involve facts similar to those alleged by the plaintiffs. Contrary to the plaintiffs' argument, *Griffin v. Breckenridge,* 403 U.S. 88 (1971) did not involve similar facts. Specifically, in *Griffin,* the plaintiffs alleged, in pertinent part:

> "4. On July 2, 1966, the . . . plaintiffs . . . were passengers in an automobile belonging to and operated by R. G. Grady of Memphis, Tennessee. They were travelling upon the federal, state and local highways in and about DeKalb, Mississippi . . .
>
> 5. On July 2, 1966, defendants, acting under a mistaken belief that R. G. Grady was a worker for Civil Rights for Negroes, wilfully and maliciously conspired, planned, and agreed to block the passage of said plaintiffs in said automobile upon the public highways, to stop and detain them and to assault, beat and injure them with deadly weapons. . .
>
> 6. Pursuant to their conspiracy, defendants drove their truck into the path of Grady's automobile

> and blocked its passage over the public road. Both defendants then forced Grady and said plaintiffs to get out of Grady's automobile. . ."

Id. at 90. Unlike the *Griffin* plaintiffs, the plaintiffs in this case were not physically stopped by defendants while travelling on the public highways. To the contrary, plaintiffs arguably were not even present when the alleged desecration of the synagogue occurred.

Contrary to the plaintiffs' argument (*see* Plaintiffs' Opposition at pp. 31-32, n.14), *Hughes v. Ranger Fuel Corp.*, 467 F.2d 6, 10 (4th Cir. 1972) supports the defendant's Motion to Dismiss herein. In *Hughes*, the Fourth Circuit held that the complaint failed to state a §1985(3) claim for two reasons: (1) because the plaintiffs had not alleged the requisite class-based animus and (2) *because the plaintiffs had not adequately alleged an interference with their right to travel over the public roads.* The court noted that the fact that the plaintiffs were standing in the public highway when they were assaulted was "purely coincidental" and did not give rise to an interference with the right to travel interstate. Like in the *Hughes* case, it is purely coincidental that the members of the Shaare Tefila Congregation happen to reside in different states.[7]

In asserting an obviously spurious claim for interference with the right to interstate travel, the plaintiffs are trying to avoid the state action requirement applicable to First Amendment claims under §1985(3). Their claim of a violation of the constitutional right to interstate travel is nothing more than a carefully disguised claim for violation of the First Amendment right to assemble and worship. They really are arguing that the defendants' conduct in-

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[7] Significantly, all of the individual named plaintiffs reside in Maryland. Furthermore, the Shaare Tefila Congregation, as an institutional plaintiff, is not entitled to assert an interference with the constitutional right of interstate travel.

terfered with their freedom of religious association. This Court should not allow the plaintiffs to avoid the state action requirement applicable to First Amendment claims under §1985(3) by alleging such a spurious claim for interference with the right to travel. For the reasons discussed above, plaintiffs' §1985(3) claim cannot be based on interference with the constitutional right to travel interstate.

B. Plaintiffs have not stated a §1985(3) claim for violation of 42 U.S.C. §§1981 and 1982.

Plaintiffs argue that their §1985(3) claim properly can be based on violations of 42 U.S.C. §§1981 and 1982. However, for the reasons discussed elsewhere in this memorandum and in the original Memorandum in Support of Motion to Dismiss, plaintiffs have failed to state claims under those sections. Consequently, plaintiffs' §1985(3) claim cannot be based on §§1981 and 1982.

C. Plaintiffs have not stated a §1985(3) claim for violations of Maryland criminal and common law.

Contrary to plaintiffs' statement (*see* Plaintiffs' Opposition at p. 33), neither the case law nor the legislative history of §1985(3) support application of that statute to state-created rights. Although the Supreme Court has not decided whether such rights are protected by §1985(3), it has indicated that the statute's coverage must be construed narrowly. Furthermore, as noted in the Memorandum in Support of Motion to Dismiss at pp. 13-14, numerous courts, including the Fourth Circuit, have emphasized the federal nature of the "predicate" rights protected by §1985(3).

In *Griffin v. Breckenridge*, 403 U.S. 88, 101-02 (1971), the Supreme Court, while extending §1985(3)'s coverage to private conspiracies, emphasized that the statute was not intended "to apply to all tortious, conspiratorial interferences with the rights of others." The Court obviously was determined to avoid federalizing tort law. It was able

to do so merely by requiring proof of discriminatory animus for purposes of §1985(3) claims. However, in the *Griffin* court's discussion of the statute's legislative history, it also indicated that §1985(3) properly is limited to protection of the rights of U.S. citizens:

> "Representative Willard, draftsman of the limiting amendment, said that his version 'provid[ed] that the essence of the crime should consist in the intent to deprive a person of the equal protection of the laws and of equal privileges and immunities under the laws; in other words, that *the Constitution secured, and was only intended to secure, equality of rights and immunities, and that we could only punish by United States laws a denial of that equality*' . . . Representative Shellabarger's explanation of the amendment was very similar: '*The object of the amendment is . . . to confine the authority of this law to the prevention of deprivations which shall attack the equality of rights of American citizens. . .*' "

(Emphasis added.) *Id.* at 100.

In *Great American Federal Savings & Loan Ass'n. v. Novotny*, 442 U.S. 366 (1979), the Supreme Court continued to emphasize that §1985(3) is limited to the protection of federal rights. Holding that §1985(3) is not available to redress violations of rights created by Title VII of the Civil Rights Act of 1964, the Court stated:

> "Section 1985(c) . . . creates no rights. It is a purely remedial statute, providing a civil cause of action when some otherwise defined *federal right*—to equal protection of the laws or equal privileges and immunities under the laws—is breached by a conspiracy in the manner defined by the section."

(Emphasis added.) *Id.* at 376. In separate concurrences in *Novotny*, two of the Supreme Court justices stated that

§1985(c) was intended to provide a remedy only for conspiracies "to violate those fundamental rights derived from the Constitution." *Id.* at 379 (Powell, concurring); 383 (Stevens, concurring).

Most recently, in *United Brotherhood of Carpenters and Joiners, Local 610 v. Stotts,* ___ U.S.___, 77 L.Ed.2d 1049 (1983), the Supreme Court, without reaching the question whether state-protected rights are protected by §1985(3), underscored its narrow interpretation of that statute:

> "In the first place, it is a close question whether §1985(3) was intended to reach any class-based animus other than animus against Negroes and those who championed their cause, most notably Republicans. . . . Although we have examined with some care the legislative history that has been marshalled in support of the position that Congress meant to forbid wholly non-racial, but politically motivated conspiracies, we find difficult the question whether §1985(3) provided a remedy for every concerted effort by one political group to nullify the influence of or do other injury to a competing group by use of otherwise unlawful means. To accede to that view would go far toward making the federal courts, by virtue of §1985(3), the monitors of campaign tactics in both state and federal elections, a role that the courts should not be quick to assume. . . .
>
> We realize that there is some legislative history to support the view that §1985(3) has a broader reach. Senator Edmunds's statement on the floor of the Senate is the clearest expression of this view. . .Senator Edmunds's views, since he managed the bill on the floor of the Senate, are not without weight. But we were aware of his views in *Griffin*. . .and still withheld judgment on the question whether §1985(3), as enacted,

> went any farther than its central concern--combatting the violent and other efforts of the Klan and its allies to resist and to frustrate the intended effects of the Thirteenth, Fourteenth and Fifteenth Amendments. Lacking other evidence of congressional intention, we follow the same course here."

Id. at 1059-60. Thus, while the decision in *Stotts* turned on the unquestioned necessity for racially-based animus in a §1985(3) claim, it reaffirmed *Griffin's* reluctance to permit the federal statute to become a source of redress for every violation of law.

Although the Fourth Circuit has not considered explicitly a §1985(3) claim based on state-protected rights, the language of its opinions emphasizes that a violation of *federal* rights is required to state a §1985(3) claim. For example, in *McNutt v. Duke Precision Dental & Orthodontic Laboratories, Inc.*, 698 F.2d 676 (4th Cir. 1983), the court stated:

> "The plaintiff's complaint attempted to state a claim under 42 U.S.C.A. §1985(3). It alleges the deprivation of equal protection of the laws arising out of a conspiracy between the two individual defendants to prevent the prosecution of Tankin on the assault charge. Section 1985(3) merely provides a remedy for the violation of rights guaranteed by *federal law or the constitution*. . .Plaintiff's complaint may not be read to state a cause of action under §1985(3) for violation of rights flowing directly and exclusively from the Fourteenth Amendment because neither defendant is a public official. The only specific act allegedly done by Duke, the employer, and Tankin, co-employee, in aid of a conspiracy, was that several months after the plaintiff's discharge the two defendants sought to dissuade the pros-

> ecutor from proceeding with the prosecution of Tankin. That, however, would violate no *federal* right of the plaintiff. Though the plaintiff felt that he had been seriously wronged, he had no *federal* right to exercise the prosecutor's discretion or to foreclose pleas of leniency by the accused and his employer.
>
> There is no allegation that the defendants in any other manner deprived the plaintiff of any privilege or immunity granted by *the laws of the United States.* The district court properly dismissed the §1985(3) claim."

(Emphasis added.) *Id.* at 679-80. The remaining cases cited in the defendant's Memorandum in Support of Motion to Dismiss at pp. 13-16 contain similar language emphasizing the federal nature of the rights protected by §1985(3).

Contrary to plaintiffs' argument (*see* Plaintiffs' Opposition at pp. 37-40), there is little persuasive authority among other circuits for the notion that a state-created right is an appropriate predicate right under §1985(3). The Fifth Circuit's decision in *McLellan v. Mississippi Power & Light Co.*, 545 F.2d 919 (5th Cir. 1977), simply did not address the issue. The only state-created rights asserted by the plaintiff in that case were his private contract rights. The court felt it unnecessary to resolve the issue presented by those state rights because of the absence of the class-based discrimination required by §1985(3).[8] *See also Scott v. Moore*, 640 F.2d 708, 718 (5th Cir. 1981) (suggesting that the question of whether state or federal statutory rights are protected by §1985(3) was not foreclosed by *McLellan*).

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[8] Indeed, the Fifth Circuit found "it less than clear that one who violates the unique, individual contract rights of another has deprived him of the protection of the laws as *Griffin* construed that phrase." 545 F.2d at 931.

It is true that *Life Insurance Co. of North America v. Reichardt,* 591 F.2d 499 (9th Cir. 1979), held that a state-created right to be free from private discrimination was a right protected by §1985(3). However, the validity of that portion of the *Reichardt* opinion has been questioned in light of subsequent Supreme Court decisions. As the court explained in *Thompson v. International Association of Machinists and Aerospace Workers,* 580 F. Supp. 662 (D.D.C. 1984):

> "Plaintiff states in her opposition to defendants' motion to dismiss that violations of the D.C. Human Rights Act can provide the substantive basis for a §1985(3) claim, relying on . . . *Reichardt* . . . for the proposition that the remedial provisions of §1985(3) apply with equal force to deprivations of state and federal rights. Plaintiff's reliance on *Reichardt* is rejected here as [Great American Federal Savings & Loan Association v.] Novotny, [442 U.S. 366 (1979)] which postdates *Reichardt* by several months, describes §1985(3) as a remedial statute "providing a civil cause of action when some otherwise defined *federal* right--to equal protection of the laws or equal privileges and immunities under the laws--is breached by a conspiracy." *Novotny,* 442 U.S. at 376. . ."

(Emphasis added.) *Id.* at 667. Indeed, at least one district court within the 9th Circuit has found *Reichardt* and *Novotny* irreconcilable. *Kinniburgh v. Burlington Northern Railroad Co.,* 568 F. Supp. 655, 656-57 (D.Mont. 1983).[9]

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[9] Contrary to the plaintiff's suggestion (*see* Plaintiffs' Opposition at p. 39), *Reichardt* has not been broadly followed by other circuits. While it does appear that the Second Circuit in *People v. 11 Cornwell Co.,* 695 F.2d 34 (2d.Cir. 1982) relied upon the questionable *Reichardt* opinion, neither the 5th Circuit in *Earnest v. Lowentritt,* 690 F.2d 1198 (5th Cir. 1982) nor the 6th Circuit in *Shimman v. Frank,* 625 F.2d 80

Finally, the plaintiff's reliance upon a few selected passages from the voluminous and conflicting legislative history of §1985(3) should not be viewed as supporting the notion that the statute was designed to provide a federal remedy for state-protected rights. As one thoughtful commentary concluded, after a thorough review of the legislative history of the statute:

> "At the heart of the *Griffin* Court's fear of overextending section 1985(c) was the prospect of federalizing tort law--a fear equally applicable to section 1985(c) actions based on contractual or other rights grounded in state law. In this the Court echoed the constitutional and prudential concerns of the 1871 Congress, which sought to preserve the traditional balance of state and federal authority. One might argue, as did the radical Republicans whose efforts were stymied by the moderate majority in 1871, for centralized federal power governing rights based on tort, contract, property, or state statute; the fundamental constitutional decision made by the Founders in 1787 and reaffirmed by the Congresses in the years following the Civil War was otherwise."

Comment, *A Construction of Section 1985(c) in Light of Its Original Purpose,* 46 U.Chi.L.Rev. 402, 429 (1979)[10]

It is clear from the above discussion that the protection of §1985(3) extends only to federal rights. Consequently, plaintiffs' §1985(3) claim cannot be based on alleged violations of Maryland criminal and common law.

(6th Cir. 1980), reached the issue. Indeed, the 6th Circuit's decision in *Shimman* left intact a lower court's dismissal of a §1985(3) claim. 625 F.2d at 86 n.10.

[10] This law review article contains a useful discussion of the legislative history of §1985(3). After reviewing that history, it concludes that the statute should be limited to protecting federal constitutional rights.

Respectfully submitted,

/s/ ROBERT B. BARNHOUSE
ROBERT B. BARNHOUSE
(Trial Bar No. 00303)

/s/ DEBORAH T. GARREN
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EXHIBIT A

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

CIVIL ACTION NO. K-78-1120

BARBARA TOLSON, *et al.*
v.
WILLIAM M. AITCHESON, *et al.*

ORDER

This matter having come before the Court to be heard on plaintiffs' complaint, motion for default judgment and petition for equitable and declaratory relief, and the Court having considered the pleadings and other papers submitted to the Court, and, being now fully advised, it is hereby ORDERED that:

DEFAULT JUDGMENT

(1) Judgment by default be and hereby is entered against defendant William M. Aitcheson on the issue of his liability to the plaintiffs, as stated in the complaint in this action.

DECLARATORY RELIEF

(1) It is further ORDERED, ADJUDGED AND DECREED that the activities, as set forth in the complaint, of defendant William M. Aitcheson and those in active concert or participation with him violated the Civil Rights laws, 42 U.S.C. §§ 1981, 1982, 1985(3); the Federal Fair Housing law, 42 U.S.C. § 3617, and Maryland common law.

EQUITABLE RELIEF

(1) It is further ORDERED that defendant William M. Aitcheson and all others in active concert or participation with him, who receive notice of this Order, be and they hereby are enjoined from harassing, assaulting, or intimidating plaintiffs or any other black or Jewish persons or organizations in the Washington metropolitan area;[1] trespassing on plaintiffs' property or the property of any other black or Jewish persons or organizations in the Washington metropolitan area or otherwise interfering with plaintiffs, members of the National Association for the Advancement of Colored People, Prince George's County, Maryland Branch, the Metropolitan Washington Planning and Housing Association, B'nai B'rith Hillel Foundation at the University of Maryland, Beth Torah Congregation, and the Jewish Community Council of Washington, or any other black or Jewish persons in the exercise of their rights to reside, own property, conduct business or practice their religion in the Washington metropolitan area. No provision of this Order shall in any way prohibit or restrain any person from the exercise of his constitutional or other lawful rights.

(2) It is further ORDERED that William M. Aitcheson and all others in active concert or participation with him, who receive notice of this Order, be and they are hereby enjoined from burning crosses, carrying or discharging firearms or explosives or placing Ku Klux Klan symbols in the vicinity of homes in the Washington metropolitan area owned or occupied by black or Jewish persons or in the vicinity of places in the Washington metropolitan area where black or Jewish persons congregate for the purpose

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[1] The Washington metropolitan area as used in this Order comprises the following jurisdictions: Washington, D.C.; Montgomery County and Prince George's County, Maryland; and Alexandria City, Arlington County, Fairfax County, Loudon County and Prince William County, Virginia.

of religious worship or in any place in the Washington metropolitan area where the effect of such activities is likely to be the intimidation of black or Jewish persons for the purpose of interfering with the exercise of their rights to reside, own property, conduct business, or practice their religion in the above-mentioned area.

(3) It is further ORDERED that defendant William M. Aitcheson shall not engage in or cause others to engage in any future physical, audio, or visual contact with the Barbara Tolson - Philip D. Butler family in any manner or form.

(4) It is further ORDERED that defendant William M. Aitcheson will inform the Court,through his counsel, of his present address and any change in his address during the next five years (commencing from the date of this Order). All such information provided by the said defendant to this Court in accordance with this Paragraph (4) will, upon the receipt thereof, be placed in the official court file in this case, under seal, and will not be revealed to anyone without an advance showing of good cause therefor and without written notice to counsel for the defendant and without an Order of this Court.

(5) It is further ORDERED that counsel for the defendant serve a true copy of this Order upon William M. Aitcheson on or before May 3, 1982, and notify this Court, in writing, on or before that date that he has so done.

(6) Anyone in active concert or participation with defendant William M. Aitcheson during the period encompassed by the complaint having notice of this Order who violates any of the terms thereof shall be subject to arrest, prosecution and punishment by imprisonment or fine, or both, for criminal contempt under the laws of the United States of America. Alternatively, such person may be ordered to show cause why he should not be held in contempt, and subjected to remedial orders of this Court which

may include, among other provisions, imprisonment or fine, or both.

It is so ORDERED, this 21st day of April, 1982.

/s/ FRANK A. KAUFMAN
Chief United States District Judge

IN THE SUPREME COURT
OF THE UNITED STATES
October Term, 1986

No. 85-2156

SHAARE TEFILA CONGREGATION, *et al.*,
Petitioners,

v.

JOHN WILLIAM COBB, *et al.*,
Respondents.

ORDER

The motion of Anti-Defamation League of B'nai B'rith, et al. for leave to file a brief as *amici curiae* is granted. The motion of respondent Michael David Remer for leave to proceed *in forma pauperis* is granted. The petition for a writ of certiorari is granted. The case is set for oral argument in tandem with No. 85-2169, *St. Francis College* v. *Al-Khazraji*. Justice Scalia took no part in the consideration or decision of these motions and this petition.